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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JACK A. ELLIOTT, RICHARD GALEN, ROBERT W. HEFFER, GEORGE D. SPRADLEY, MAX TIPTON and C. DUANE THOMPSON,

Petitioners

v.

GROUP HOSPITAL SERVICE, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an employment discrimination case, the testimony of an employer official that the challenged employment decision was prompted by a non-discriminatory reason must be accepted absent "countervailing evidence that it was not the real reason for the discharge." (Stated otherwise, whether, in an employment discrimination case, the fact-finder (here the jury) is permitted to reject the uncontradicted testimony of an interested employer witness on the basis of its assessment that the witness is not credible.)

2. Whether, in an age discrimination case, evidence that an employer has dismissed a number of highly qualified older employees and replaced them with much younger employees may be considered by the fact-finder, in the absence of a showing that as a matter of probability the pattern is "statistically significant."

3. Whether, in an employment discrimination case, where the plaintiff has introduced evidence establishing a prima facie case and an official of the defendant employer testifies to a facially-rational non-discriminatory reason for the challenged employment decision, the plaintiff bears a "heavy burden" of proof that the proffered reason is pretextual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Statutes

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jack A. Elliott, Richard Galen, Robert W. Heffer, George D. Spradley, C. Duane Thompson, and Max Tipton respectfully petition this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 16, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 714 F.2d 556, is reprinted in the Appendix (hereinafter "App") at 1a-22a. The order denying rehearing and rehearing *en banc* is unreported, and is reprinted at App. 23a. The judgment of the United States District Court for the Southern District of Texas, entered following a jury verdict, is unreported, and is reprinted at App. 24a-27a. The orders of the District Court denying respondent's motions for judgment n.o.v. and new trial are unreported, and are reprinted at App. 28a-29a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 16, 1983. A timely petition for rehearing was denied on November 25, 1983. On February 14, 1984, Justice White signed an order extending the time for filing a petition for a writ of certiorari to and including March 17, 1984 (App. 30a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, are as follows:

Section 4(a)(1), 29 U.S.C. § 623(a)(1):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12(a), 29 U.S.C. § 631(a):

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

In this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the jury, after a five-day trial, returned a verdict for the plaintiffs (petitioners), but the Court of Appeals overturned that verdict. In this posture, the evidence must be viewed in the light most favorable to petitioners, and our statement proceeds accordingly.

Respondent is an insurance company, doing business as Blue Cross-Blue Shield of Texas (App. 3a). Petitioners all were, until the terminations giving rise to this lawsuit, executives in respondent's Marketing Division (App. 4a). In April, 1978, Walter Hachmeister was promoted to the position of president-elect of respondent (App.

3a). Hachmeister announced that he wanted "new blood" in the Marketing Division (App. 17a) and that "my people are going to have to be lean and mean" (App. 17a; Tr. 1058, 606-607). Within a five-month period, an unprecedented shake-up of incumbent executives occurred within the Marketing Division, with older executives (including the six petitioners) terminated, and younger men, who had been their subordinates, moved up to replace them.

Ten executives were fired, all above the age of 40 and thus within the age group protected by the ADEA. Six (the six petitioners herein) were replaced. Each was replaced by a younger man. Five of the six replacements were under 40. The average age of the petitioners was 49.5, thirteen years older than the average age of their replacements, 36.5 (App. 17a-18a).

Of the ten terminations, eight were from top executive positions within the Division. The following table, derived from P. Ex. 141-A, lists the incumbents in the top executive levels of the Marketing Division, showing the ages of those who were terminated and those who were kept:

Position	Name	Age	Terminated
Vice President	Eller	48	X
Assistant V.P.	Galen	49	X
	Owens	39	
Reg. Sales Mgr.	Tipton	56	X
	Elliott	50	X
	M. Owens	45	X
	Lutz	44	X
	Bagwell	43	
	David	42	
	Slack	33	
Mgr./Director	Shivers	61	
	Spradley	53	X
	Thompson	48	X
	Pace	37	
	Ricks	29	

As the table reflects, the oldest of the two Assistant Vice Presidents was terminated, as were the four oldest of the seven Regional Sales Managers, and, with one exception, the oldest of the Manager/Directors. Additionally, at the district manager level (not shown on the table), there were two terminations, both of persons over the age of 40. (App. 18a, n.12). No one below the age of 41 was terminated. (*Id.*).

Each of the petitioners was a long-term employee of respondent, all but two having at least 20 years of service (Tr. 10, 302, 353, 494).[1] Each was terminated without prior notice or discussion, and (except in the case of petitioner Tipton) without being given any reason for the termination other than that there was to be a "new team" and the petitioner would not be on it (Tr. 28, 77-78, 218-20, 295-96, 352-54, 422-24). None of the petitioners (again except Tipton) was offered continued employment in another capacity (Tr. 997-998).[2]

Respondent had a comprehensive evaluation system, under which each executive was annually rated in a variety of categories by higher management and on the basis of that evaluation was assigned an overall rating of Marginal, Adequate, Competent, Superior or Distinguished. (P. Ex. 9). At the time of their termination, two of the petitioners (Heffer and Tipton) were rated "Distinguished," a rating reserved for that "small percentage of employees" who are "truly outstanding" and combine "extraordinary accomplishments" with "brilliance" (Tr. 233, 488; P. Ex. 9, p. C-10). Three of the petitioners (Galen, Elliott and Spradley) were rated "Superior," a rating "reserved for the unusually effective employee" whose performance is "above what is normally expected"

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[1] Petitioner Thompson had 18 years of service, and petitioner Heffer 11 years of service (Tr. 221, 411).

[2] Alone of the petitioners, Tipton allegedly was discharged for "cause" (Tr. 997). Ironically (given that allegation), Tipton was the only petitioner offered continued employment in another capacity (Tr. 998).

(Tr. 14, 298-99, 348; P. Ex. 9, p. C-10). The sixth petitioner (Thompson) was rated "Competent," meaning that he "[m]eets the full job requirements satisfactorily with some unusually effective performance . . . [and] is definitely satisfactory on the present job" (Tr. 416; P. Ex. 9, p. C-9).

Four of the petitioners had managerial authority over sales, and each of these four was assigned a sales quota by top-management at the outset of each year. Meeting that quota was, according to respondent's witness (Tr. 978-979), the principal responsibility for these executives. Each of the four had exceeded the assigned quota in each of the two years preceding his termination, in some instances by as much as 200% to 400%, and three of the four had exceeded quota consistently for years before as well (Tr. 18-19, 242-43, 252, 299, 489-90).

Respondent's evidence as to the reasons for the terminations consisted of the testimony of its officials who participated in the termination decisions:

According to respondent's testimony, "the reason for Galen's discharge was a perceived disloyalty because he had sought to undercut his immediate superior, approaching Hachmeister with a 'resumé' of things to be accomplished were he to succeed that superior" (App. 19a). Galen, a 20-year employee rated "Superior," testified that he had approached Hachmeister because he had heard rumors that his superior was leaving, and that he told Hachmeister he would like to be considered for the position if the rumors were true but that he was not seeking to displace the incumbent if the latter wished to remain (Tr. 96). Respondent did not dispute Galen's version of his conversation with Hachmeister (Tr. 976). Galen, who was 49, was replaced by the youngest of his seven immediate subordinates, Tom Slack, who was 33 (Tr. 27; *supra*, p. 3).

Elliott was terminated, according to respondent's witnesses, "because his region had not achieved the company's desired market penetration or productivity, the un-

disputed fact being that the market penetration there (in Houston) was approximately five to six percent, as compared to the company's state-wide market penetration of twenty percent" (App. 19a). Elliott, a 20-year employee rated "Superior," testified, and also submitted documentary evidence proving, that top management set sales quotas for Houston reflecting what respondent thought attainable in the competitive Houston market, quotas that Elliott had met and exceeded (Tr. 299). Elliott, who was 50, was replaced by the promotion of Royce Barron, age 33, from a lower-level position (Tr. 40; P. Ex. 141-A).

Tipton was terminated, according to respondent's witnesses, because "he had violated company policy by having a contractor who was remodeling his new regional offices leave out a wall, producing the twin effect of enlarging his personal office beyond the square footage permitted by the company for an officer of his rank and eliminating the employees' lounge" (App. 19a-20a). Tipton, a 20-year employee rated "Distinguished," testified that he had received authorization from his superior to leave out the wall pending approval at a higher corporate level (Tr. 480)—authorization that the superior confirmed in his testimony (Tr. 129). Because the authorization was contingent, Tipton had made arrangements with the contractor that the wall would be installed on two hours' notice at no extra charge should that course become necessary (Tr. 483-84)—an arrangement that was known by respondent's officials at the time they decided to terminate Tipton (Tr. 483-84, 783-84). Tipton, who was 56, was replaced by Larry Bagwell, who was 43 (Tr. 40, 782). Tipton had been told by top management only weeks before his termination that his record was superior to Bagwell's (Tr. 500-501). Alone of the petitioners, Tipton was offered continued employment in a lower-level capacity (Tr. 998).

Heffer was terminated, according to respondent's witnesses, for "inability to work with others" (Tr. 594).

According to these witnesses, Heffer had trouble keeping salesmen because of his personality (Tr. 767), and his new superior (the 33-year-old Barron, who replaced petitioner Elliott), had derived a perception from his brief contacts with Heffer that Heffer resented Barron's promotion and that they would not be able to work together as a "team" (Tr. 683-84, 689). Heffer, an 11-year employee rated "Distinguished," testified that the only reason salesmen left was that the company's salaries for salesmen were not competitive in the Houston area (Tr. 247)—a fact confirmed in written company documents[3]. Three salesmen who had worked under Heffer testified that Heffer had a great attitude and salesmen loved working for him (Tr. 1011, 1017, 1035), and Heffer's written evaluations gave him the highest-possible ratings in management of subordinates (P. Ex. 3, Nov. 1, 1977, performance appraisal). As for Barron's perceptions, Heffer testified that they had met only twice since Barron's promotion, that he (Heffer) had done nothing to communicate resentment of Barron's promotion, and that in fact he had not resented it (Tr. 1043-44). One of respondent's own witnesses testified that Heffer had always had a good attitude and he was "surprised" when he learned that Heffer had been terminated (Tr. 812-14). Heffer, who was 41, was replaced through the promotion of Mike McGuire, six years his junior, who was moved up from managing a smaller office (Tr. 40, 268-69).

Spradley was terminated, according to respondent's witnesses, because he "lacked the personality to deal with others in management positions and had demonstrated that he did not have the capabilities or desire to be Manager of National Accounts" (App. 19a). Respondent's witness conceded on cross-examination that Spradley had received an "adjustment raise" three months prior to his termination, and that respondent's practice is that "if an employee's performance is not satisfactory he does not

[3] "We are not economically competitive in our salary program with the Houston employment market" (P. Ex. 1, Dec. 22, 1977 performance appraisal).

receive an adjustment raise" (Tr. 579). Spradley, who was age 53 and a 30-year employee, was rated "Superior" (Tr. 41, 348, 353). He was replaced though promotion of Pat Patrick, age 39 (Tr. 354-55).[4]

Thompson, according to respondent's witnesses, was dismissed because he had "neglected" the sales training program that was his primary responsibility (App. 19a). Thompson, who was an 18-year employee and rated "Competent," testified that the program was in fine shape until the year preceding his termination, at which point he had been pulled away for several months to perform special projects at the request of the company president; that in consequence the program needed updating; that at the time he was terminated he had completed a memorandum outlining the steps needed to update the program; and that the revised program prepared by his successor was substantially along the lines he had proposed (Tr. 419-20, 437-39, 457-63). A number of witnesses called by petitioners testified that the sales training program had been effective up to the point Thompson was diverted by the special assignments (Tr. 249-50, 310, 1012-13, 1018-19, 1029-31); respondent's witness testified that Thompson had "given good performance" but not "what I considered top-flight performance" (Tr. 939). Thompson, who was 48, was replaced by Ed Hulsey, age 36 (Tr. 41).

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[4] The opinion below states (App. 19a):

> The record reflects that during the three years preceding Spradley's termination he had been transferred into and out of a total of four different positions, with the final transfer, Manager of National Accounts, being a decided demotion.

The record shows that the first three positions were special assignments heading short-term projects at the request of the company president (Tr. 341-44), and that Spradley's transfer to Manager of National Accounts (the only point that he suffered a reduction in pay) was voluntary and at Spradley's request, because the work was in his area of expertise and thus more to his liking (Tr. 344 (Spradley); Tr. 827 (respondent's witness)).

Respondent called an expert witness in statistics. The expert was told nothing about the incumbents of the top jobs in the Marketing Division except their ages and the positions they held. He was asked to testify to the probability that in a random termination of eight incumbents from that group all eight would be age 40 or over.[5] The expert testified that the probability of this phenomenon occurring randomly was .0643, or approximately one in sixteen. The expert further testified that it is a convention in statistics to treat only probabilities of five percent or less (approximately two standard deviations) as statistically significant, and as the probability here was over six percent there was not by that convention a statistically significant correlation between age and the phenomenon that had occurred (D. Ex. 34, Chart E; Tr. 865-67, 880). On cross-examination, the expert acknowledged that his analysis took no account of the ages of those who *replaced* the terminatees, and thus reflected nothing as to the probability of the random occurrence of *both* eight terminatees all being over 40 *and* their replacements being substantially younger (Tr. 883).

Rulings in the District Court

The district court denied respondent's motion, made at the close of petitioners' case-in-chief, to dismiss under Rule 41(b) on the ground that petitioners "had failed to establish a prima facie case" (App. 6a). At the close of all the evidence, the district court denied a renewed motion of the same effect (App. 7a, n. 7; 8a).

The district court instructed the jury that to prevail each petitioner had to prove "that age was a determining factor" in his termination, *i.e.*, that "the employer would not have acted as he did but for the employee's age"

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[5] The expert's analysis did not embrace the district sales manager positions, which had yielded two additional terminations, both of persons over 40. See n. 14, *infra*.

(R. 78, p. 6). The jury returned a verdict in favor of each of the petitioners (App. 24a-25a).[6]

The district court denied respondent's motion for judgment n.o.v., "[b]ecause the Court holds that the evidence presented at trial of this case was of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions" (App. 28a). Final judgment was entered on the jury verdict (App. 24a-27a), and respondent's motion for a new trial was denied (App. 29a).

The Court of Appeals' Decision

The court of appeals reversed, holding that "the evidence was insufficient to support the jury's finding of age discrimination" (App. 22a). The court acknowledged that at least five of the six petitioners had established a prima facie case of age discrimination, *i.e.*, that each had shown that he was qualified for the position he held, that he was discharged, that he was within the class protected by the ADEA (ages 40-70), and that he was replaced by someone younger (App. 16a-27a, 20a).[7] But, the court

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[6] The jury also found that the discharge of each plaintiff was "willful" (App. 25a). Despite that finding, the district court refused to award the liquidated damages provided in 29 U.S.C. § 626(b) for "willful" violations of the ADEA, declaring that it was exercising the "discretion" that the Fifth Circuit has allowed to district courts in that regard (App. 26a, citing *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976)). Petitioners cross-appealed, contending that, as other circuits have held, liquidated damages for "willful" violations are mandatory under the ADEA (App. 2a-3a, n. 2). The court of appeals declined to decide this issue, in light of its overturning of the violation finding (*id.*; see also App. 22a). This remedy issue would, of course, remain for decision by the court of appeals upon remand were this Court to grant certiorari and reverse the decision below as to the merits.

[7] The court of appeals noted that the parties were in dispute as to whether the sixth petitioner, Spradley, had shown he was qualified to perform his job (App. 17a), and did not expressly state its view on whether Spradley had established a prima facie case. Given the undisputed testimony that three months before his termination Spradley received a raise that goes only to those whose

noted, witnesses for respondent had testified to a reason other than age for terminating each (App. 19a-20a), and "[i]t cannot be said that any of these reasons is irrational or idiosyncratic" (App. 20a). The court then declared:

> Once such a reason for discharge is articulated by adequate evidence, the plaintiff's established prima facie case is not necessarily sufficient to take the case to the jury. [*Id.*]

The court reasoned that when a plaintiff presents "no more evidence of discrimination" than that necessary to establish a prima facie case,

> and the defendant presents evidence justifying and explaining the discharge, the trier of fact is not free to disregard that explanation without countervailing evidence that it was not the real reason for the discharge. [*Id.*]

The court stated further:

> [W]here, as here, the reasons articulated are rational ones, the objective truth of which is not seriously disputed, the burden of establishing them as pretextual is a heavy one indeed. [App. 22a].

The court explained what evidence might meet that "heavy" burden:

> [P]erhaps a successful statistical demonstration by expert testimony, perhaps proof that others similarly situated were not discharged. [*Id.*]

That heavy burden was not met here:

> Such proof is lacking here; and as to this, the verdict lacks rational support in the record. Since it does, and since the element of pretext was critical, the verdict cannot stand. [*Id.*]

In arriving at this point, the court below dismissed as without probative force petitioners' showing that their terminations were part of an unprecedented "purge[]" (App. 4a)—initiated by a new president's call for "new

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performance is adjudged satisfactory (see pp. 7-8, *supra*), it seems clear that the jury could have found Spradley qualified to perform his job.

blood" and "lean and mean" executives—in which ten older executives were terminated and replaced by persons on average 13 years younger. The court reasoned that the testimony of respondent's expert that "the probability that age was not a factor was . . . 6.43 percent" meant that "age could neither be ruled in nor ruled out statistically as the factor leading to the discharges" (App. 18a and n. 12); as "the statistical evidence was equivocal," "reasonable jurors" could not "properly have concluded" that the pattern of discharges was probative of discriminatory intent (App. 20a). Indeed, "it appears that the statistical evaluation undercuts the theory that age was a determining factor in any of the employment decisions" (App. 18a, n. 12).[8]

REASONS FOR GRANTING THE WRIT

The court below was able to conclude that "the evidence was insufficient to support the jury's finding of age discrimination" (App. 22a) only because it had made a number of legal rulings depriving the evidence presented by plaintiffs of its natural probative force. Each of these rulings has significant implications for the trial and resolution of employment discrimination cases generally.

First, the court ruled that although a plaintiff has established a *prima facie* case of employment discrimination, if an official of the defendant testifies that a nondiscriminatory reason motivated the challenged employ-

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[8] Petitioners had introduced substantial evidence rebutting the factual accuracy of the reasons advanced in the testimony of respondent's witnesses (see pp. 5-8, *supra*). That testimony was detailed in petitioners' brief below, and the opinion of the court of appeals implicitly reflects (albeit disparagingly) its awareness of that evidence: "none [of the petitioners] *seriously* disputed either his awareness of or the objective truth of the company's stated ground of dissatisfaction with him" (App. 20a, emphasis moved); "each appellee advanced *little* if anything more than his belief that age caused his discharge" (App. 21a, emphasis added); "here, the reasons articulated [by respondent's witnesses] are rational ones, the objective truth of which is not *seriously* disputed" (App. 22a, emphasis added).

ment decision, "the trier of fact is not free to disregard that explanation without countervailing evidence that it was not the real reason for the discharge" (App. 20a). This rule deprives the jury of the power to discredit the defendant's witness' testimony based on the witness' demeanor, the imprecision of the witness' testimony, or the improbability of the witness' explanations in light of other circumstances in the case. The rule adopted by the court below is in conflict with this Court's decision in *Labor Board* v. *Walton Mfg. Co.*, 369 U.S. 404 (1962) (striking down the identical rule when applied by the Fifth Circuit in the context of anti-union motivation under the NLRA), and is in direct conflict with a recent decision of another circuit, *Carter* v. *Duncan-Huggins, Ltd.*, —— F.2d ——, 34 FEP Cases 25, 31 (D.C. Cir. 1984).

Second, the court found that each plaintiff's case had to be considered as if that plaintiff were the only older employee that was fired, without regard to the evidence that ten highly qualified senior employees were fired and replaced by significantly younger persons. The court ruled that such evidence was not probative because this pattern of conduct was not shown to be "statistically significant" (App. 18a and n. 12, 20a). This ruling is in direct conflict with the decision of the Sixth Circuit in *Marsh* v. *Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981), and the decision of the District of Columbia Circuit in *Carter* v. *Duncan-Huggins, supra.* The court's ruling also provided that statistical evidence of probability levels that are not standing alone satistically significant may not be considered by the fact-finder in conjunction with other evidence of discriminatory intent. That aspect of the court's ruling is in conflict with *Inmates of Nebraska Penal, Etc.* v. *Greenholtz*, 567 F.2d 1368, 1379 (8th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978).

Third, the court ruled that where an employer's witnesses testify that non-discriminatory reasons motivated

the challenged employment decision, and those reasons are "rational ones, the objective truth of which is not seriously disputed, the burden of establishing them as pretextual is a heavy one indeed" (App. 22a). This "heavy burden," which has no analogue elsewhere in the law, is inconsistent with this Court's recent declaration that the factual question of employer motivation is to be decided "just as district courts decide disputed questions of fact in other civil litigation." *U.S. Postal Service Bd. of Governors* v. *Aikens*, —— U.S. ——, 103 S. Ct. 1478, 1482 (1983).

As we discuss below, each of these issues merits this Court's plenary consideration.[9]

1. The court below has held that notwithstanding the plaintiffs' establishment of a *prima facie* case, "the trier of fact is not free to disregard" the facially reasonable explanation proffered in the employer's otherwise uncorroborated oral testimony "without countervailing evidence that it was not the real reason for the discharge" (App. 20a). That rule is identical to the rule that same court had followed in anti-union motivation cases under the National Labor Relations Act—until the rule was struck down by this Court in *Labor Board* v. *Walton Mfg. Co.*, 369 U.S. 404 (1962). As quoted by this Court in *Walton*, the Fifth Circuit's rule in NLRA cases was as follows:

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[9] This Court has granted certiorari in *Westinghouse Electric Corp.* v. *Vaughn*, No. 82-2042, cert. gr. Oct. 17, 1983, a case in which the petitioner-employer asks this Court to impose certain limitations upon the fact-finder's freedom in evaluating evidence of discriminatory motivation. Brief for the Petitioners in No. 82-2042, p. i, Questions Presented 1 and 2. The issues raised in *Vaughn* are similar to, but not the same as, the first issue raised herein. The resolution of *Vaughn* is not likely to resolve the first issue presented in the instant case, and it cannot resolve the remaining issues presented in this case. Accordingly, we urge that *certiorari* be granted in this case without awaiting disposition of *Vaughn*.

> [T]he controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to reemploy in each instance. . . . [T]he discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. [369 U.S. at 406-407.]

This Court in *Walton* struck down the rule just quoted, explaining its vice in terms that are equally applicable to this case:

> The test in the [Fifth Circuit's opinion] . . . is that the employer's statement under oath must be believed unless there is "impeachment of him" or "substantial contradiction," or if there are "circumstances" that "raise doubts" they must be "inconsistent with the positive sworn evidence on the exact point." But the Examiner—the one whose appraisal of the testimony was discredited by the Court of Appeals—sees the witnesses and hears them testify, while . . . the reviewing court look[s] only at cold records. As we said in the *Universal Camera* case:
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> > . . . The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. 340 U.S. at 496.
>
> For the demeanor of a witness
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> > . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricat-

ing, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *MacDougall*, 201 F.2d 265, 269. [*Walton*, 369 U.S. at 407-408.] [10]

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[10] The holding in *Walton* reflects a long-standing principle, earlier applied in *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899). The issue in *Sonnentheil* was the propriety of submitting to the jury the question whether creditors accepting a deed of trust had knowlege at the time of acceptance that the deed was fraudulent, despite their uncontradicted testimony that they had no such knowledge. This Court held the matter was properly submitted to the jury:

> [The witnesses] were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses . . . the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. [172 U.S. at 408.]

Justice Frankfurter, dissenting in *Walton*, declared that the holding was inconsistent with two prior decisions of the Court (369 U.S. at 419-20), and some commentators, in consequence, have suggested that "[t]he Supreme Court seems to be on both sides of the question." Mezines, Stein & Gruff, *Administrative Law*, § 51.02 at pp. 51-34 to 51-35 (1983). In fact, however, the decisions cited by Justice Frankfurter are readily distinguishable. In *Dickinson* v. *United States*, 346 U.S. 389, 395-397 (1953), the Court held that a draft board could not deny a registrant exemption from military service as a "regular or duly ordained minister" by disbelieving the registrant's unimpeached and uncontradicted "testimonial and documentary evidence" that he was engaged full-time as a minister. The case is distinguishable first, because the testimony was corroborated by documentary evidence, and second, because the evidence related not to the witness' state of mind (a fact as to which there can be no other direct evidence) but to whether he functioned as a minister on a full-time basis (a fact which is susceptible to independent verification). The Court noted in this respect that "the local boards may call on the investigative agencies of the federal government" (346 U.S. at 397). Similarly, *Chesapeake & O. R. Co.* v. *Martin*, 283 U.S. 209 (1931), noted, but refused to apply, the "numerous expressions . . . to be found in the decisions to the effect that the credibility of an interested witness

In the light of *Walton*, the principle that "uncontradicted testimony may be disbelieved solely on the basis of the factfinder's determination of credibility" is "predominant among the circuits," Mezines, Stein & Gruff, *Administrative Law*, § 51.02 at p. 51-35 (1983) (citing cases). Most recently, in an employment discrimination case under 42 U.S.C. § 1981 decided in February, 1984, the District of Columbia Circuit adopted this principle, in a decision that conflicts squarely with that of the court below. *Carter* v. *Duncan-Huggins, Ltd.*, —— F.2d ——, 34 FEP Cases 25, 31 (D.C. Cir. 1984):

> . . . Duncan-Huggins offered business reasons for some of its actions . . . . The Company now appears to argue that its mere articulation of any putatively legitimate business rationale requires the court to take the case from the jury. We reject that argument. . . . Duncan-Huggins' alleged justifications for the disparate treatment were presented through the testimony of past or current employees, officers, or owners. For the most part, the only evidence of intent was oral testimony; the explanations were without support of extrinsic evidence. . . . The weight to be given to these offered business justifications thus required an evaluation of witness credibility. And an evaluation of witness credibility is the exclusive function of the jury. Indeed, where the only evidence of intent is oral testimony, a jury could always choose to discredit the proffered explanation. As we stated in *Metrocare* v. *Washington Metropolitan Area Transit Authority*, 679 F.2d [922] at 926-27 [D.C. Cir. 1982]: "The jury, whose province it was, could disbelieve the . . . supervisors' testimonial

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always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest" (*id.* at 216), because the fact at issue was "the time reasonably necessary for completion of delivery to the Bowman warehouse after the receipt of the shipment at petitioner's yards" (*id.* at 215), and the witness' testimony on this point "was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so" (*id.* at 216).

> explanation of why they acted against the [employee] . . . and thus could find their asserted justifications to be pretextual." Because the strength of the purported business reasons—and indeed the strength of the Company's case—was thus inextricably interrelated to questions of witness credibility, the case had to go to the jury.

Resolution of this circuit conflict is particularly important to the future litigation of employment discrimination cases. This Court observed recently, in *U.S. Postal Service Bd. of Governors* v. *Aikens*, —— U.S. ——, 103 S. Ct. 1478, 1482-83 (1983);

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. . . . The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:
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> > "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much [a] fact as anything else." *Eddington* v. *Fitzmaurice*, 29 Ch.Div. 459, 483 (1885).

When the person whose state of mind is at issue takes the witness stand, his credibility is likely to be central to the resolution of the case. To require, as the court below has done (App. 20a), that that person's testimony that an innocent reason motivated an employment decision *must* be credited in the absence of "countervailing evidence that it was not the real reason for the discharge"

is to usurp the fact-finder's function on the central factual issue in the case. As *Walton* recognized, the witness' demeanor may be critical to assessing the credibility of his testimony.[11] Beyond that, the generality of his "innocent" explanation and his inability to furnish specifics that support the generalization may reinforce the fact-finder's impression that the witness is not telling the truth. And, finally, that impression may be reinforced still more by the inherent improbability that the innocent reason, even if factually correct, would truly have motivated the witness to dismiss an otherwise stellar employee; as *Walton* recognized, the "inherent probability of testimony" may be key to the fact-finder's assessment of th ewitness' credibility.[12]

The issue thus raised is central to the litigation of employment discrimination cases where proof of intentional discrimination is required. It is common for the plaintiff to make out a prima facie case of intentional discrimina-

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[11] As the court below observed, albeit in a different context, "[s]elf-serving . . . testimony is subject to especially searching scrutiny" (App. 16a).

[12] *Walton*, 369 U.S. at 408, quoting *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 496 (1951). These considerations were present in this case with respect to all the petitioners. Two were rated Distinguished by respondent's own evaluations, three Superior, and one Competent (see pp. 4-5, *supra*). It was surely for the jury to decide whether respondent's witnesses' testimony that they terminated long-standing employees of this caliber for the reasons they proffered should be credited. In ADEA cases as in all others, common sense remains a part of the jury's fact-finding arsenal. The case of petitioner Tipton (p. 6, *supra*), furnishes a typical example. Respondent's witnesses testified that they terminated this "Distinguished" employee (whose superiority in respondent's view to the person who replaced him was undisputed) because with the tentative approval of higher management, he enlarged his office under arrangements that the smaller size could be reinstated on two hours' notice at no cost to the company. The court below held that the jury was not free, from its assessment of the demeanor of respondent's witnesses and of the inherent plausibility that a 20-year employee of Tipton's quality would be peremptorily dismissed on such a trivial ground, to find this testimony incredible.

tion by introducing evidence establishing the elements, or an appropriate variation of the elements, set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (the plaintiff was qualified for the job, was a member of a protected group, and was denied (or removed from) the job, and the job was then given to another not in the protected group). As this Court has explained, proof of those elements eliminates:

> . . . at least . . . the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for refusal to hire is sufficient, *absent other explanation*, to create an inference that the decision was a discriminatory one. [*Teamsters* v. *United States*, 431 U.S. 324, 358 n. 44 (1977) (emphasis added).]

If the inference is justified "absent other explanation," what is the effect on that inference of testimony by an employer representative that the employer's conduct at issue was motivated by some legitimate reason?[13] Obviously, if the testimony of the employer witness is believed by the fact-finder, any inference of discrimination arising from the *prima facie* case would be wiped away. But if the testimony of the employer witness is not believed—whether because of plaintiff's rebuttal case, plaintiff's cross-examination, the inherent implausibility of the explanation, or simply the witness' demeanor—the inference of discriminatory intent would still be warranted. A disbelieved explanation can no more destroy the inference than an absent explanation.

It follows that where an employer witness testifies to a legitimate reason for challenged conduct, the fact-finder must be allowed to determine whether that testimony should be believed, even if the plaintiff does not in-

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[13] Our discussion focuses solely on the *factual inference* that is warranted from the evidence establishing the *prima facie* case, not upon the status of the rebuttable *presumption* that also is created by such evidence.

troduce "countervailing evidence that it was not the real reason for the discharge." (App. 20a). This Court appears to have indicated as much in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-256 and notes 9, 10 (1981), and in *U.S. Postal Service Bd. of Governors* v. *Aikens*, —— U.S. ——, 103 St. Ct. 1478, 1482-1483 (1983).

The court below, which hears a large number of employment discrimination cases, nevertheless reached the opposite result, holding that despite the plaintiff's establishment of a prima facie case an employer witness' testimonial explanation of the reasons for the challenged conduct may require that an employment discrimination case be taken from the jury. Given the frequency with which the rule of the court below will be dispositive in disparate treatment litigation, its correctness should be addressed by this Court.

2. In reaching the conclusion just discussed, the court below analyzed the case as if plaintiffs had proved no more than a bare-bones prima facie case (App. 21a):

> The record in this case establishes that the plaintiff-appellees were in the ADEA's protected age group, that most were qualified, and that they were terminated and (except for one) replaced by younger employees. It carries the plaintiffs no further.

As we have already shown, a prima facie case, whether bare-bones or not, is, by definition, sufficient to get a case to a jury where the defendant's evidence of its reasons for taking the challenged action consists solely of the testimony of interested witnesses. But the court below believed that if the defendant provides an innocent explanation for his challenged action, a jury is not permitted to disbelieve that explanation unless the plaintiff has introduced some evidence of discriminatory intent over and above that contained in a bare-bones prima facie case. Assuming, *arguendo*, that the court were correct on that point, a second issue worthy of this Court's consideration is raised by the decision below: whether

the court below erred in refusing to consider as probative the evidence that ten highly qualified older employees had been fired and replaced by significantly younger employees (all but one under age 40), and instead regarding the case of each plaintiff as no stronger than if he were the only older employee dismissed.

The court acknowledged that plaintiffs had

> . . . established that all six appellees were terminated, that all were over forty, and that all but Tipton were replaced by men under forty. Those fired averaged 49.5 years, their replacements 36.5. In addition, appellees asserted that four persons other than appellees were terminated during the reorganization period and that each was over forty. [App. 17a-18a.]

But the court held that such evidence was entitled to no weight because an expert on statistics called by defendant testified that, considering only the ages of the ten terminated employees and the ages of the employees who were not terminated, there was a 6.43 percent probability that age was not a factor in the terminations.[14] The court ruled that this level of probability exceeded the "threshold of five percent" necessary for a finding of statistical significance, and therefore concluded that it was improper to consider plaintiffs' evidence that the terminations were part of a pattern (App. 18a and n. 12, 20a).

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[14] The court below noted that respondent's expert did not factor into his statistical analysis the terminations of two district sales managers both over age 40 (one of whom was petitioner Heffer). The court, engaging in its own "expert" analysis, stated that "the statistical significance of age would obviously decrease" (App. 18a, n. 12) if district sales managers were included in the analysis. The court's suggestion reflects a misunderstanding of the expert's method of analysis. When that method of analysis is properly understood, factoring in the district sales manager population and the terminations therefrom leads to a result contrary to the Court's suggestion, i.e., it establises that the probability of all ten of the terminatees being over age 40 is less than 3%, well below the 5% threshold for statistical significance accepted by the court. The proper analysis is set forth in detail in an appendix to our Petition for Rehearing filed in the court below.

The court below reached that result apparently because of its understanding of principles emanating from this Court's decisions in *Castaneda* v. *Partida*, 430 U.S. 482, 496-497 n. 17 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299, 308-309 n. 14, 311-312 n. 17 (1977). This Court indicated in those cases that where a plaintiff's case is based *solely* on statistical evidence—*i.e.*, evidence that the numerical distribution of employees resulting from the employer's conduct is as a matter of statistics unlikely to have occurred by chance—such evidence "a[s] a general rule" must establish, if the plaintiff is to prevail, that "the difference between the expected value and the observed number is greater than two or three standard deviations." A five percent likelihood that a particular numerical configuration could have resulted by chance is the approximate equivalent of a difference of two standard deviations.

As we now discuss, this ruling of the court below is questionable for three distinct reasons.

First, the court below seemed to assume that the sole relevance of evidence of defendant's pattern of terminating older employees was to show that, as a matter of probability, it was likely that age was a causal factor in each termination. At one point, the court even stated that "[a]t bottom, [plaintiffs'] case is one of statistical evidence." (App. 18a, n. 12). But plaintiffs introduced no evidence of a statistical nature. It is true that the evidence relating to the pattern of terminations could give rise to an inference regarding the probability of an innocent explanation for each termination, and could indeed provide the raw data for a statistical analysis of that probability. However, that same evidence was highly probative on issues apart from the question of probability.

Plaintiffs' theory of the case was that their terminations were the result of defendant's scheme to get rid of older employees and replace them with younger employees. That theory proceeded initially from the evidence

of defendant's announced desire for "new blood" and "lean and mean" executives. And, the theory required a showing that in fact defendant had terminated a number of highly qualified older employees and replaced them with significantly younger employees. Without such a showing, plaintiffs' theory that each termination was part of a broader scheme would not be persuasive. But with such a showing, the evidence permitted the members of the jury to evaluate, based on their own experience and on the particular circumstances shown in the record evidence, and without reference to any analysis of probabilities, whether plaintiffs had proved such a scheme. If the jury believed that such a scheme existed, it could evaluate the credibility of the particular reasons given by the employer for the termination of each plaintiff in that light. And, by the same token, the jury's evaluation of the credibility of the reasons given for each termination might reflect on its determination of whether there was such a scheme.

Thus, the first question raised by the court's according no probative value to the evidence of a pattern of terminations of older employees is this: whether *Castenada* and *Hazelwood* meant to preclude a plaintiff's reliance upon evidence of a pattern of conduct, where the events constituting the pattern do not by themselves lead to a statistically significant probability of discriminatory conduct, but where the fact of the pattern is probative on an issue distinct from the question of probability.

Second, even if the relevance of the pattern evidence were restricted to questions of probability, the conclusion reached by the court below would be contrary to well-established rules of evidence and to decisions of other circuits. Lay persons, without the benefit of statistical expertise, may perceive a particular pattern of events to be so unlikely as to give rise to an inference that the pattern did not occur by chance but was intended. Such pattern evidence has always been considered probative

without any showing of satistical significance.[15] Thus, Wigmore explains:

> Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. [2 Wigmore, Evidence § 302 (Chadborn Ed., 1979).]

See also, e.g., Carter v. *Duncan-Huggins*, —— F.2d ——, 34 FEP Cases 25, 32-33 (D.C. Cir. 1984); *Jay Edwards, Inc.* v. *New England Toyota Distributor*, 708 F.2d 814, 824 (1st Cir.), *cert. denied*, 104 S. Ct. 241 (1983); *Marsh* v. *Eaton Corp.*, 639 F.2d 328, 329-330 (6th Cir. 1981); *N.L.R.B.* v. *Camco, Inc.*, 340 F.2d 803, 809-812 (5th Cir. 1965), and cases cited therein.

The decision below, which rules that such pattern evidence may not be considered by the fact-finder without a showing of statistical significance, cannot be reconciled with the results of the cases just cited. Indeed, in *Marsh* and *Carter*, the Sixth Circuit and the District of Columbia Circuit, respectively, expressly rejected the precise reasoning adopted by the court below: in both cases the plaintiff had introduced evidence of a pattern akin to the evidence introduced by plaintiffs in the instant case; in both cases, the defendant argued that such evidence was not probative because the plaintiff had not shown the pattern to be "statistically significant"; in both cases, that argument was rejected. 639 F.2d at 329; 34 FEP Cases at 32-33. The following passage in *Carter* succinctly describes the rationale of both *Carter* and *Marsh*:

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[15] Of course, as *Castenada* and *Hazelwood* suggest, such evidence *standing alone* might not be sufficient to establish a plaintiff's case.

> "A plaintiff attempting proof of disparate treatment in a small work force is entitled to offer evidence and argument, be it persuasive or not, involving comparison of treatment accorded different workers. The 'statistical' inferences to be drawn are for the trier of fact . . . ."
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> • • • •
>
> As with any other circumstantial evidence the jury was the proper body to weigh the evidence and to decide whether any inferences could be drawn. [34 FEP Cases at 32 (quoting and adopting district court opinion) and 33]

This Court should grant the writ of *certiorari* in this case to resolve the conflict between the decision below and the decisions in *Marsh* and *Carter*. The issue of the probative value of pattern evidence in the absence of proof of statistical significance is important in the day-to-day judicial processing of the various types of discrimination cases. And, this case presents an appropriate occasion to settle the law on this point.

Third, in yet another respect, the ruling in question conflicts with a decision of the Eighth Circuit. While plaintiffs in the instant case did not introduce any statistical evidence, defendant chose to do so. Defendant's expert testified that based solely on an analysis of the ages of the employees who were terminated and the ages of the employees who were not terminated—and without taking into account such factors as the qualifications and ratings of the terminated employees or the ages of the employees who were hired to replace the terminated employees [16]—there was a 6.43 percent probability that age was not a factor in the terminations. That probability level considered by itself might not have been sufficient

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[16] The court below stated that defendant's expert compared the ages of the terminated employees "to the ages of their replacements" (App. 18a). The court was mistaken in so stating. Defendant's expert expressly acknowledged that he did not take into account the ages of the replacements in his analysis of whether age was a factor in the terminations (Tr. 883).

to establish a case of intentional discrimination. See p. 23, *supra*. But, in this case, that probability level might well have been deemed probative by the jury when considered in conjunction with the other evidence in the case.

The jury had much more to work with than had defendant's expert. The jury knew not only the ages of the terminated employees and the non-terminated employees, but also that: (1) the replacement employees were on the average 13 years younger than the terminated employees; (2) a number of the terminated employees were highly qualified and had received ratings of "Superior" or "Distinguished"; (3) the employer's new management had expressed a desire for "new blood" and a "lean and mean" team; and (4) the reasons given by the employer for a number of the terminations were, or could be found to be, of dubious persuasiveness. Moreover, the expert took it as a given that a substantial number of senior executives were to be "purged" (App. 4a), and examined only the likelihood that all would be over 40; the jury was entitled to inquire whether such a purge—wholly unprecedented in the company's history (Tr. 588)—would have occurred at all but for the ages of the victims. Considered in this context, the jury might well have found the probability finding of the defendant's expert—which was based on only a portion of the evidence presented to the jury—to be helpful in reaching its conclusions. If there were only a 6.43 percent likelihood that age was not a factor without, for example, taking into account the ages of the replacements or the qualifications of the terminatees, the jury might well have concluded that that likelihood would be less were these additional factors accounted for.

The question thus raised is whether statistical evidence of probability levels that are not standing alone found to be "statistically significant" may be considered by the fact-finder in conjunction with other evidence of discriminatory intent. The court below answer that question in the negative. The Eighth Circuit, in *Inmates of*

Nebraska Penal, Etc. v. *Greenholtz*, 507 F.2d 1368, 1379 (8th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978), reached the opposite conclusion.

This conflict, too, should be resolved by this Court. The issue of the use of statistical evidence that falls short of "statistical significance" is a recurring one in employment discrimination litigation. This case presents an appropriate occasion to clarify the law on this issue.

3. The court below held that where an employer's official testifies that innocent reasons motivated the challenged employment decision, and those reasons are "rational ones, the objective truth of which is not seriously disputed, the burden of establishing them as pretextual is a heavy one indeed" (App. 22a). It is a rare employee who, after decades of service, has not done *something* that an employer could seize upon as a pretext for a discriminatorily motivated decision. As there will almost always be *something* which the employer's witnesses can testify to, the "objective truth" of which cannot be "seriously disputed," the "heavy burden" that the court below has mandated will result in directed verdicts for defendants in discharge cases where, applying the ordinary evidentiary rules, discrimination would be found.[17]

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[17] The assessment of the court below that *in this case* the "objective truth" of the reasons proffered by respondent's witnesses was not "*seriously* disputed"—a formulation repeated twice in the court's opinion (App. 20a, 22a, emphasis added)—indicates the Fifth Circuit's continuing propensity to reweigh the evidence in discrimination cases. *See Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). Petitioners *did* "seriously dispute" the "objective truth" of the reasons proffered by respondent's witnesses. See pp. 5-8, *supra*. In part, the court below arrived at its contrary assessment simply by mischaracterizing the record evidence. For example, Tipton, while acknowledging that he had enlarged his office, testified that he had been authorized to do so by his immediate supervisor, *and the supervisor testified to the same effect* (see p. 6, *supra*). Yet the court below "found" that the supervisor "did not remember approving this action" (App. 4a, n. 5). Spradley testified that he had transferred *voluntarily* from a vice-presidency to manager of national accounts because the work in the latter position (but not the former) was within his area of interest and expertise,

The severity of the "heavy burden" that the court below imposed is reflected by its application in this case. The court refused to permit a jury finding of pretext despite petitioners' showing that that respondent had consistently evaluated them as "Superior" and "Distinguished" employees, that the reasons assigned for their terminations were relatively trivial, that they were terminated without even a prior conversation or opportunity to plead for retention, and that despite their decades of service and respondent's acknowledgement that most were commendable employees they were not offered retention in some other capacity.[18]

This Court has never held that plaintiffs have a "heavy burden" to prove pretext. On the contrary, this Court has decreed that the factual question of motive is to be decided "just as district courts decide disputed questions of fact in other civil litigation." *Aikens*, 103 S. Ct. at 1482. "In short, the [fact-finder] must decide which party's explanation of the employer's motivation it believes." *Ibid.*

There is no place in this scheme for the "heavy burden" the court below has imposed. That requirement would deprive plaintiffs of the protection of federal law in numerous cases where, applying the usual burdens, discrimination would be found. The "important national policy" reflected in the equal employment statutes (*Aikens*, 103 S. Ct. at 1482) thus would be disserved. This Court accordingly should strike down the "heavy burden" requirement imposed by the court below.

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and respondent's witness confirmed that the transfer was voluntary (see p. 8 n.4, *supra*). Yet the court below "found" that the transfer was "a decided demotion" (App. 19a). The court below also usurped a jury function in its repeated pronouncements that the reasons proffered by respondent's witnesses were, in all the circumstances of this case, persuasive explanations for the terminations (App. 20a-22a). See p. 19, n. 12, *supra*.

[18] Ironically, the one petitioner allegedly discharged for "cause" (Tipton) was the *only* one offered retention in another capacity. See p. 4 and n. 2, *supra*.

CONCLUSION

For the reasons set forth hereinabove, this Court should grant certiorari to review the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 81-2356, 82-2235

JACK ELLIOTT, *et al.*,
Plaintiffs-Appellees-Cross Appellants,

v.

GROUP MEDICAL & SURGICAL SERVICE, *et al.*,
Defendants,

GROUP HOSPITAL SERVICE, INC.,
Defendant-Appellant-Cross Appellee.

Sept. 16, 1983

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), was enacted on December 15, 1967 (effective June 12, 1968), following the completion of a study by the Secretary of Labor required by Congress when it enacted the Civil Rights Act of 1964.[1] The

[1] Age discrimination was at first included in draft legislation which was to become Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976), but later deleted in favor of a study. Subsequent to the completion of the study, Congress lifted the substantive provisions of Title VII almost verbatim in drafting the ADEA. In consequence, courts have construed the two sets of legislation consistently and cases from one are frequently applied to similar cases under the other. *See generally* Note, The Age Discrimination in Employment Act of 1967, 90 Harv.L.Rev. 380 (1976). More, in *Oscar Mayer & Co., v. Evans*, 441 U.S. 750, 756, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609 (1979), the Court instructed that where the source of a section in the ADEA parallels Title VII the two statutes are to be construed consistently.

ADEA's announced goal is the "elimination of discrimination from the workplace," *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978) by "[p]romoting employment of older persons based on their ability rather than age . . . [and] prohibit[ing] arbitrary age discrimination in employment." 29 U.S.C. § 621(b). To this end, the ADEA provides statutory protection to individuals aged forty through seventy. *Id.*, § 631(a). This appeal concerns a suit brought pursuant to the ADEA by six protected former employees (collectively referred to as "appellees") of Group Hospital Service, Inc. ("Hospital Service"), appellant. In the district court, the jury found, *inter alia*, that these former employees had been willfully discriminated against because of age. Concluding that the evidence adduced at trial was insufficient to support the jury's verdict, we reverse the judgment of the district court.

Background and Procedural History

Two major contentions are before us. The first concerns the sufficiency of the evidence to support the jury's finding of age discrimination and certain attendant procedural issues. The second centers upon the propriety of a prophylactic order of the district court. The district court denied appellees' motion for liquidated damages. However, it granted a motion for a supersedeas bond to protect appellees' interest in the event this court determined that that ruling was in error.[2]

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[2] The ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b). *See id.* § 216(b) (defining liquidated damages). Within this circuit the above constraint has been construed as permissive. Hence if, after a jury finding of willfulness, the trial court makes a finding that the employer acted in good faith and had reasonable grounds for believing that its actions were not violative of the ADEA, the trial court possesses the discretion to determine the amount, if any, of a liquidated damages award. *See Hendrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981); *Hays v. Republic*

Because the procedural posture of the present action is somewhat complicated and because our resolution of the procedural issues guides our analysis, we delineate the facts as developed below with some care. The record reflects that sometime during April of 1978 Walter Hachmeister learned that he was president-elect of Hospital Service, an insurance company incorporated under the laws of Texas and doing business as Blue Cross-Blue Shield of Texas.[3] In preparation for his role as president Hachmeister began to assemble a management team

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Steel Corp., 531 F.2d 1307 (5th Cir. 1976). The trial court here, despite the jury's specific finding of willfulness, declined to award liquidated damages. Appellees contend that our permissive approach to liquidated damages runs counter to both the policy and underlying legislative history of the ADEA and urges that we join those circuits that have held that upon a finding of willfulness, liquidated damages in the amount of actual damages must be awarded. *See Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981); *Wehr v. Burroughs, Inc.*, 619 F.2d 276 (3d Cir. 1980); *Syrock v. Milwaukee Boiler Mfg. Co.*, 27 F.E.P. 610 (7th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981). In the alternative, appellees argue that because of the specific finding that Hospital Service willfully violated the ADEA and because the district court declined to award liquidated damages without making factual findings of good faith, on the record, we must remand for such a determination. *Hendrick, supra*, is cited as support for this legal theory. In light of the ultimate disposition of the present case we must decline appellees' offering. Accordingly, we express no view as to whether *Hendrick* requires a trial court to enter its factual findings on the record in order to support its discretion in this area. Nor do we believe the present facts warrant an inquiry into our established approach to liquidated damage awards.

[3] Our understanding of the record indicates that Hachmeister was president-elect of Hospital Service. In turn Hospital Service is the parent organization of Group Medical and Surgical Service and Group Life and Health Company. Collectively these entities do business in Texas under the name Blue Cross-Blue Shield of Texas and enjoy an independent yet advisory relationship with other Blue Cross-Blue Shield plans.

and to review the company's past performance.[4] Hachmeister's analysis concluded that Hospital Service could increase both the efficiency of its sales operations and its market penetration by consolidating its Life and Marketing Divisions so as to eliminate overlapping in their respective sales functions. In consequence, Hachmeister implemented a plan to accomplish this goal upon assuming the presidency.

Under this reorganization a number of top executives in the Marketing Division were purged: (1) Richard Galen was replaced as an Assistant Vice President; (2) George Spradley was relieved of his duties as Manager of National Accounts; (3) Robert Heffer was replaced as Houston North District Manager; (4) Duane Thompson was replaced as Sales Training Director; and (5) Jack Elliott was ousted as Regional Sales Manger for the Houston Region. In addition, subsequent to the reorganization, Max Tipton was replaced as Manager of the Abliene Regional Offices.[5] Each of the above-mentioned

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[4] The line managerial hierarchy of the marketing division in descending order is as follows: Vice President, Assistant Vice President, Regional Sales Manager I, Regional Sales Manager II, Regional Sales Manager III and District Manager. Director of Sales Training and Manager of National Accounts appear not to be considered line functions and report directly to the Vice President. In total the above titles represent approximately 29 persons, all with a significant degree of managerial authority. Appellees make much of Hachmeister's consultations with two regional managers, individuals obviously within the managerial chain of command and vested with organizational responsibility. We find nothing invidious in such a consultation where the sole charge is that they were younger than the employees discharged. In fact, appellees conceded that these particular managers were extremely bright and capable.

[5] At trial Tipton stipulated that his discharge was not a part of the corporate reorganization and that he was terminated for insubordination in the form of changing the structural plans of the Abilene Regional Office to effectively give himself an office that was twice as large as approved by company policy. At trial Tipton urged that he sought and received approval for this action. We note that appellee's co-defendant, Galen, was his immediate supervisor and did not remember approving this action.

executives were within the ADEA's protected age group. More, each, with the exception of Tipton, was either given notice of termination or terminated between October 1978 and January 1979,[6] and filed notice pursuant to 29 U.S.C. § 626(d) with the Department of Labor of his

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[6] Appellant urges in this appeal that appellees Elliott and Galen did not timely file a notice of intent to sue because each had constructive notice of his termination prior to the final day of employment by virtue of a Cessation of Employment Agreement. The agreement between Elliott and the company is presented here by way of example; the Galen agreement is substantially the same:

> As mutually agreed, effective October 9, 1978 your responsibilities and authority as Regional Sales Manager C of our companies will cease. This action does not cease your employment with Group Hospital Service, Inc., and you may continue your employment for up to three months from the date of this agreement.
>
> During your continued employment, it is agreed:
>
> 1. You will earnestly solicit other gainful employment during this three-month period, and should you find other gainful employment during this three-month period, your employment with Group Hospital Service, Inc., will cease on the last day of the pay period in which you commence your other gainful employment. Determination of what constitutes "other gainful employment" shall be made by Group Hospital Service, Inc.
>
> 2. Due to the circumstances, attendance in our offices and regular working hours will not be expected during your continued employment with Group Hospital Service, Inc. You will be available for inquiries by Group Hospital Service, Inc., and will respond in good faith and to the best of your abilities to any such inquiry.
>
> 3. You will return all company property on the date of this agreement and your status as a required company car user ceases on the date of this agreement.
>
> 4. All other employee benefits will continue during your continued employment and your salary at its present level will be paid at the end of each pay period in accordance with present salary administration policy.
>
> 5. This document constitutes the complete agreement concerning your cessation of employment with Group Hospital Service, Inc.

intent to sue Hospital Service, Group Medical and Surgical Service, and Group Life and Health Company. Tipton filed a corresponding notice on June 29, 1979. On October 22, 1979, these former employees, acting in concert, filed suit in the United States District Court for the Southern District of Texas. The gravamen of their complaint was that they had been willfully discriminated against because of age.

The defendant companies answered that appellees were indeed terminated and that they were within the ADEA's protected age group at the time of their termination. In addition to conceding that appellees had been replaced by persons outside of the ADEA's protected age group, they urged that Group Medical and Surgical Service and Group Life and Health Company were improperly joined as party defendants. At the close of appellees' case in chief, the district court instructed a verdict as to all defendants except Hospital Service. Hospital Service, in turn, moved to dismiss the claims of Elliott, Galen and Heffer for failure "to fulfill the jurisdictional prerequisites required to maintain an action under the provisions of the Age Discrimination in Employment Act of 1967." *See* Fed.R.Civ.P. 12(b)(6). In sum, Hospital Service urged that the district court did not have jurisdiction to entertain the complaints of these parties because they had failed to file a notice of intent to sue within 180 days after the occurrence of the discriminatory action complained of. *See* 29 U.S.C. § 626(d)(1). Appellant also argued that plaintiffs Galen, Tipton and Spradley had failed to establish a *prima facie* case. *See Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977). The district court carried the former motion with the case and denied the latter.

At the close of its case in chief, Hospital Service proffered the following motion: "to dismiss on the grounds

that plaintiff failed to make a *prima facie* case." [7] The

[7] Apparently there was some confusion at the close of all the evidence and the court reporter neglected to transcribe appellant's motion at the time it was made. The following affidavit reflects our understanding of the circumstances surrounding appellant's motion:

AFFIDAVIT

COMES NOW Ernie J. Ambort, Jr., and gives the following sworn affidavit:

I.

THAT I reside at 16330 David Glen, Friendswood, Harris County, Texas; that I can be reached by telephone at (713) 482-0970.

II.

THAT presently I am self-employed as a free-lance court reporter in Houston, Texas. THAT at all times material to this Affidavit I was employed as a court reporter for the United States District Court for the Southern District of Texas, Houston Division.

III.

THAT I was the court reporter for the case of Jack Elliott, et al vs. Group Hospital Service, Inc., et al; Civil Action No. H-79-2179 tried in July, 1981 before the Honorable George E. Cire, United States District Judge. THAT I have caused to be filed an official transcript of said trial with the United States Court of Appeals, Fifth Circuit.

IV.

THAT the transcript of said trial proceedings as filed does not reflect that the attorney representing the defendant made a motion that the defendant after the close of all of the evidence renewed its motion made at the close of the Plaintiff's case to dismiss on the grounds that the Plaintiff failed to make a prima facie case.

V.

THAT I have this day checked my court reporting notes of the trial and those notes do not contain defendant's motion to dismiss made at the close of all of the evidence. It is at this time my recollection within the Chambers of the Court at a time when my short-hand machine was in the courtroom that I was instructed by the Court before the Charge of the Court was read to the jury to let the record show that the defendant reurged at the close of all of the evidence its motion to dismiss

district court permitted the case to go to the jury. In response to special issues, the jury found that Hospital Service had discriminated against each of the named plaintiffs by discharging him from his employment because of his age and that the discharges were willful. The jury awarded damages aggregating over one million dollars to the plaintiffs in amounts for which the district court subsequently entered final judgment, adding attorneys' fees and costs. As noted above, the district court declined to award liquidated damages despite the jury's finding of willfulness. Both parties appealed, Hospital Service from the adverse judgment, asserting evidentiary insufficiency; appellees from the refusal of the court to award liquidated damages, claiming a legal right to additional liquidated damages in an amount equal to the jury's damage award. *See* note 2, *supra*.

On motion, the district court entered a Stay Order pending appeal, on condition that Hospital Service post security in an amount equal to the award. Subsequent to this order plaintiffs moved the district court to require additional security, contending that more was necessary in order to satisfy the potential judgment on appeal should we determine that an award of liquidated damages was required. The district court entered an order granting the motion and required appellant to post additional security.

Procedural Issues

A. Motion for Directed Verdict?

Our threshold consideration concerns which issues have been preserved on appeal. If, as appellees suggest, appellant's motion at the conclusion of all the evidence did not

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made at the close of the Plaintiff's case on the grounds that the Plaintiff did not make a prima facie case and that such motion was overruled; and that I failed to properly record the same on my shorthand machine when I returned into the courtroom as instructed.

constitute a motion for directed verdict then we are precluded from considering Hospital Service's request for a reversal of the district court's judgment. *See Thomas v. City of New Orleans*, 687 F.2d 80, 83 (5th Cir. 1982). Initially, appellees' briefs urged that Hospital Service's motion "preserves no error because it refers to only one plaintiff and because it fails to specify which plaintiff defendant contends failed to prove a *prima facie* case." In this connection appellees also advanced the ancillary argument that the motion lacked the required specificity to be properly considered a motion for directed verdict. *See* Fed.R.Civ.P. 50(a). In the alternative, appellees contended that at most Hospital Service's motion preserved only the motion made at the close of appellees' case in chief—that Galen, Tipton and Spradley failed to prove a *prima facie* case. This argument suggests that our analysis is confined to an examination of whether a *prima facie* case was in fact established and no more.

Upon reflection appellees concede, and we agree, that appellant's reference to a single plaintiff was no more than a slip of the tongue in the heat of trial and that the intended object of the motion was the entire opposing array. Appellees insist, however, that this concession does not vitiate their argument that Hospital Service is barred from questioning the sufficiency of the evidence in this court because its motion for dismissal for want of a *prima facie* case does not rise to the specificity required of a motion for directed verdict, its motion for judgment n.o.v. notwithstanding. *See Maxey v. Freightliner Corp.*, 665 F.2d 1367 (5th Cir. 1982). More, appellees maintain their stance that in any event our analysis is confined to whether the elements of a *prima facie* case are present and no more.

The law in this circuit, as generally elsewhere, is that "the sufficiency of the evidence supporting a jury verdict is not reviewable on appeal . . . unless a motion for di-

rected verdict was made at the close of all the evidence by the party seeking that review." *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1024 (5th Cir. 1979). As we noted in *Quinn*, however, the strict application of this rule gives way to considerations of policy and fundamental fairness:

> When a claimed deficiency in the evidence is called to the attention of the trial judge and of counsel before the jury has commenced deliberations, counsel still may do whatever can be done to mend his case. But if the court and counsel learn of such a claim for the first time after verdict, both are ambushed and nothing can be done except by way of a complete new trial. It is contrary to the spirit of our procedures to permit counsel to be sandbagged by such tactics or the trial court to be so put in error.
>
> The rule is a strict one, however, and we and other courts have taken a liberal view of what constitutes a motion for directed verdict for these purposes. *There is much to be said for the view that whenever a party, at the conclusion of the evidence and before the jury has begun to deliberate, clearly points out a claimed evidentiary deficiency to court and counsel, not by way of conversation or speculation but on the record in an unambiguous formal motion for relief, however denominated, this should suffice.* To hold otherwise would be to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.

597 F.2d at 1025 (footnote omitted) (emphasis supplied). *See also* C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2536, p. 594. Applying these notions to the present case impels the conclusion that appellant's motion at the close of all the evidence should be read as a motion for a directed verdict. We reach this determination through a series of questions whose answers we find grounded in reason.

In age discrimination cases the relevant inquiry is whether the plaintiff has produced evidence from which a trier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. In order to establish a *prima facie* case the discharged employee, generally, must prove he (1) is within the protected class; (2) was discharged; (3) was qualified for the position; (4) was replaced by someone outside the protected class, *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977); or (5) by someone younger, *Wilson v. Sealtest Foods*, 501 F.2d 84 (5th Cir. 1974); or (6) show otherwise that his discharge was because of his age, *McCuen v. Home Insurance Co.*, 633 F.2d 1150 (5th Cir. 1981). Thus the elements of such a *prima facie* case come to little more than establishing the standing requirements of the ADEA and blunting the defendant's probable rejoinder that the plaintiff has not been discriminated against. *See Williams v. General Motors, Inc.*, 656 F.2d 120 (5th Cir. 1981); *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980).

In contrast, when such a motion comes at the conclusion of all the evidence and the defendant has put forth evidence in rebuttal, logic indicates that the motion must speak to more. In this instance, the defendant mounted a factual attack against the plaintiffs' case, its resolution requiring a review of plaintiffs' evidence as compared to that presented by the defendant and a determination whether the evidence was such that reasonable men could come to but one conclusion. We believe that this analysis is equivalent in all respects to that required when considering a motion for directed verdict. *See Hedrick v. Hercules*, 658 F.2d 1088, 1089 (5th Cir. 1981). This being so, the action called for by defendant's motion, even if restricted to its terms, would be the same as that on motion for directed verdict and there is no unfairness in viewing it as such. So doing, we hold that the motion relates back to those motions raised at the conclusion of

plaintiff's case in chief and thus preserves appellant's right to challenge both the sufficiency of the evidence supporting the jury's verdict as to all the appellees and the timeliness-of-filing issues relating to appellees Elliott, Galen and Heffer. *See Dawson v. McWilliams*, 146 F.2d 38 (5th Cir. 1944).

B. Filing of Notice of Intent to Sue

Because we arrive by differing routes at the conclusion that appellees Elliott, Galen and Heffer timely filed notice of their intent to sue, we treat the issues separately.

(1) Galen and Elliott

The precise issue presented here is whether appellees Galen and Elliott were required to file notice of intent to sue within 180 days of notice of their terminations or whether the time of filing commenced to run only after a total cessation of their employment. If the former standard be applicable, it follows that the June 25, 1979, filing is time barred, since appellees raise no substantial claim that the filing was tolled. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). The record reflects that both Galen and Elliott were presented with "Cessation of Employment Agreements," Galen on October 6th and Elliott on October 10th. *See* note 6, *supra*. These agreements provided that appellees' employment would end ninety days after the presentation of the agreement and that each would receive full salary and benefits during the interim. Hospital Service contends that under prevailing case law Galen and Elliott were required to file charges of age discrimination within 180 days of the dates on which they were advised of their prospective terminations. To this end, appellant cites *Chardon v. Fernandos*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), and *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). Though *Ricks* and *Chardon* establish that the

date of notice of termination, rather than the final date of employment, is the operative date from which the 180 day filing requirement begins to run, *see Marshall v. Kimberley Clark Corp.*, 625 F.2d 1300 (5th Cir. 1980); *Payne v. Crane Co.*, 560 F.2d 198 (5th Cir. 1977), they do not govern this case.

As a general proposition, new judge-made rules on limitations are not to be applied retroactively to a plaintiff who timely filed his complaint under the then existing law of limitations. *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Because the record reflects that the present action was filed before the Supreme Court's decision in either *Ricks* or *Chardon*, we believe the above principle to be applicable here. Accordingly, we must determine the state of the law of this circuit before *Ricks* and *Chardon*.

Our standard had been that "when the employer, by acts or words, shows a clear intention to dispense with the services of an employee, a discharge occurs at the latest as of the date after which the services are no longer accepted." *Payne*, *supra*, at 199. This standard focused upon the economic realities of the employment relationship rather than any formal agreement. More, we cast the determination of when the employment relationship ceased as a question of fact. *Marshall v. Kimberley Clark Corp.*, *supra*, is illustrative of the above points. There we concluded that summary judgment for an employer was improper where the evidence did not clearly establish when the employee's "on call" status had terminated, notwithstanding that the employee had earlier received prior unambiguous notice of his impending termination. 625 F.2d at 1302. Such was our law. The record before us reflects that Galen and Elliott were on call and responded to requests during the interim period of their employment. The jury, aware of the competing arguments, determined as fact that appellees' employment ended on the final date of the cessation agreements. We

are unable to say that reasonable men could not reach that conclusion.

(2) Heffer

Whether Mr. Heffer timely filed notice of intent to sue was examined both by the trial court in disposing of appellant's motion for summary judgment and by the jury as a special interrogatory. Both concluded that Heffer's notice of intent to sue had been timely filed. We agree. Section 627 of the ADEA requires employers to post information setting forth their employees' rights under the ADEA. *See* 29 U.S.C. § 627; 29 C.F.R. § 850.10.[8] In *Charlier v. S.C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977), we held that an employer's failure to comply with section 627 vitiates the normal assumption that an employee is aware of his rights under the ADEA. *Id.* at 765. In consequence, under such circumstances the ADEA's 180-day filing period is not measured from the employee's cessation of employment, but rather from when he acquired actual knowledge of his ADEA rights, usually a fact question. *Id.* In disposing of appellant's motion for summary judgment the district court concluded that Hospital Service failed to post the required ADEA notice at Heffer's place of employment and that Heffer had filed a notice of intent to sue within 180 days of acquiring actual notice of his rights. In reaching this conclusion the district court rejected Hospital Service's claim that Heffer possessed constructive notice of his ADEA rights either by virtue of his exposure to company

[8] 29 C.F.R. § 850.10, promulgated pursuant to section 627, provides:

> Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Secretary of Labor or his authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

policy due to his seniority or as a consequence of having visited other company offices where such a notice was posted. *See Adams v. Federal Signal Corporation*, 559 F.2d 433 (5th Cir. 1977). Obviously the jury also chose to disregard appellant's theory of constructive notice.

Appellant insists that substantial evidence supports its position that Heffer was aware of his ADEA rights before his discharge. It is not, however, our province to substitute our view of the truth for that of the jury. Rather, our task is to examine the evidence in its entirety to determine whether it reasonably supports the jury's verdict. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1974).

The record reflects that there was no section 627 notice posted at Heffer's place of employment. It also reflects that there was a genuine factual dispute as to whether Heffer or some other manager had been charged with the responsibility of posting the notice on the company's behalf. More, whether Heffer possessed knowledge of the company's alleged policy against age discrimination was the subject of a classic swearing match. The jury believed Heffer; there it ends.

Having determined that we may properly examine the merits of the case, we now turn to them.

Sufficiency of the Evidence

As the Supreme Court has recently reminded us, the ultimate issue of fact in cases such as this—whether the defendant intentionally discriminated against one or more of the plaintiffs—is to be reviewed under the same standards as those in other cases. *United States Postal Service Board of Governors v. Aikens*, —— U.S. ——, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Where, as here, the case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the *McDonnell*

Douglas ritual[9] is of no consequence. We are simply to determine whether the record contains evidence upon the basis of which a reasonable trier of fact could have concluded as the jury did. *New England Merchants National Bank v. Rosenfield*, 679 F.2d 467 (5th Cir. 1983). Self-serving and speculative testimony is subject to especially searching scrutiny. *Id.*; *Ralston Purina Co. v. Hobson*, 554 F.2d 725 (5th Cir. 1977). More specifically on point, we have recognized that generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for his discharge. *Houser v. Sears, Roebuck & Co.*, 627 F.2d 756 (5th Cir. 1980).[10] Bearing these principles in mind, we turn to the evidence in our case.

The parties have followed generally the *McDonnell Douglas* format, described in note 9 above, in presenting their evidence below and their arguments on appeal.

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[9] This is one of the modes of organizing the evidence in discrimination cases. By it, the plaintiff must first establish a *prima facie* case, thus creating a rebuttable presumption that he has suffered discrimination. If the evidence ends here, the plaintiff should prevail by directed verdict. The defendant may avoid that result by introducing evidence that he acted for a nondiscriminatory reason, which the plaintiff may then attack as pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff retains the burden of persuasion on the whole case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

[10] Mr. Houser, an exceptionally able and hard-working credit manager, was fired at age 54 after almost 20 years service and replaced by a 29 year old. The defendant asserted that the reason for his discharge was a single incident in which he deliberately misapplied a credit, believing that doing so was in his employer's best interest. Despite Houser's testimony that the real reason for his discharge was to replace him with a less-senior employee not entitled, as was he, to participate in Sears' highest profit-sharing plan, we affirmed a directed verdict for Sears.

There is no direct evidence of age discrimination, and that format is one way of presenting a circumstantial evidence case. Since they have done so, it is necessary for us to discuss the elements of that format even though our concern is not with the state of the evidence at any of its stages, but rather with the evidence in the case at large. *United States Postal Service Board of Governors v. Aikens, supra.*

According to the teaching of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny,[11] in order to establish a *prima facie* case of age discrimination a plaintiff must prove that he (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; (4) was replaced by someone out side the protected class, or (5) by someone younger, or (6) show otherwise that his discharge was because of his age. *See* page 7264, *supra.*

At the outset we note that with the exception of appellee Spradley there exists no dispute as to whether appellees are qualified to perform their individual tasks. We therefore examine the evidence without consideration of this factor, leaving Spradley's qualifications for discussion below. First, appellees introduced evidence that Hachmeister stated that he wanted "new blood" in the Marketing Division and a new "lean and mean" team. Extrapolating from this statement, appellees surmised during their individual testimony that it was Hospital Service's policy to terminate older workers because a "lean and mean" team necessarily excluded them. To buttress this inference, appellees established that all six appellees were terminated, that all were over forty, and that all but Tipton were replaced by men under forty.

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[11] We recognize that *McDonell Douglas, supra*, involves a Title VII action. However, the analysis of Title VII cases has been applied to ADEA cases given the common purpose of the statutes and their nearly identical substantive provisions. *See* note 1, *supra.*

Those fired averaged 49.5 years, their replacements 36.5. In addition, appellees asserted that four persons other than appellees were terminated during the reorganization period and that each was over forty. An expert witness called by the appellant, Dr. William Schucany, a statistician, testified however that his analysis of the ages of those fired during the relevant period, as compared to the age of their replacements and to the ages of those occupying similar positions in the company, established only that age could neither be ruled in nor ruled out statistically as the factor leading to the discharges.[12] On the basis

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[12] At bottom, appellees' case is one of statistical evidence. Dr. Schucany analyzed the upper management of the department which subsequently fell under the domain of the Vice President of Marketing. *See* note 4, *supra*. There were 29 persons in these upper-level management positions, including all of the appellees except Heffer. Seven of those persons were terminated before the end of 1978; one, Tipton, was subsequently terminated. Eighteen of the 29 were forty or over. Schucany ran a standard statistical deviation test to determine whether the terminations could have occurred without age being a factor. The test was run twice, once including Tipton among those terminated and once excluding him. With Tipton excluded, the probability that age was not a factor was 8.57 percent; with Tipton included it was 6.43 percent.

The standard methodology in this test is to compare the result with a threshold of five percent. Unless the percentage is less than five percent, it cannot be statistically concluded that age was a factor in the decision to terminate. Schucany also tested the probability that the employees' position in the marketing division was a factor, and concluded that it probably was. In fact, this percentage fell well under five percent.

As noted above, the test did not include Heffer or other district sales managers. However, the record reflects that there were 21 district sales managers in the time frame covered. Of these, twelve were over forty. Of the twelve over forty, only two were terminated. If these employees were included in the statistical model the statistical significance of age would obviously decrease. Thus, it appears that the statistical evaluation undercuts the theory that age was a determining factor in any of the employment decisions. *See Harrell v. Northern Electric Company*, 672 F.2d 444, 446-47 (5th Cir. 1982) (statistical proof negated claim of absence

of this evidence, appellees contend that the most likely reason for their discharges was age in each instance. Appellant Group Hospital contends to the contrary that each discharge resulted from a corporate reorganization designed to increase management efficiency. It introduced evidence that the reason for Galen's discharge was a perceived disloyalty because he had sought to undercut his immediate superior, approaching Hachmeister with a "resumé" of things to be accomplished were he to succeed that superior. Elliott was fired, it contends, because his region had not achieved the company's desired market penetration or productivity, the undisputed fact being that the market penetration there (in Houston) was approximately five to six percent, as compared to the company's state-wide market penetration of twenty percent. As to the others, its contentions are as follows: Owens was terminated because it was believed that he did not have the necessary inner drive to lead his region and that his replacement would do a better job. The record reflects that during the three years preceding Spradley's termination he had been transferred into and out of a total of four different positions, with the final transfer, Manager of National Accounts, being a decided demotion. Appellant urges that Spradley simply lacked the personality to deal with others in managerial positions and had demonstrated that he did not have the capabilities or desire to be Manager of National Accounts. Thompson was dismissed because he had not developed a sales training program. The record reflects, and Thompson conceded, that the sales training program had "really been neglected," but that he "was going to recommend changes" to "revitalize the program." The reason stated for Tipton's termination was that he had violated company policy by having a contractor who was remodeling his new regional offices leave out a wall, producing the twin effect of en-

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of discrimination). More, Schucany's testimony concerning his statistical model, as noted above, was that age could neither be accepted nor rejected as the determinative factor in the discharges.

larging his personal office beyond the square footage permitted by the company for an officer of his rank and eliminating the employees' lounge.

It cannot be said that any of these reasons is irrational or idiosyncratic. To the contrary, each is, on its face, an adequate, nondiscriminatory one. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360 n.46, 97 S.Ct. 1843, 1867 n.46, 52 L.Ed.2d 396 (1977). Once such a reason for discharge is articulated by adequate evidence, the plaintiff's established prima facie case is not necessarily sufficient to take the case to a jury. *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-23 (5th Cir. 1982). When no more evidence of discrimination is presented than that of these plaintiffs and the defendant presents evidence justifying and explaining the discharge, the trier of fact is not free to disregard that explanation without countervailing evidence that it was not the real reason for the discharge. Such evidence may take the form of an attempted showing that the reason given by the employer, though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext.

Appellees offered no more than conclusionary statements of age discrimination. On cross-examination each admitted that he was never told that age was a factor in his discharge. When questioned directly concerning the company's stated reasons for his dismissal, none seriously disputed either his awareness of or the objective *truth* of the company's stated ground of dissatisfaction with him, maintaining only that it was inadequate to warrant his termination. Within certain limits, however, not exceeded here, such judgments as that are for the employer, not for the court. As we have noted, the statistical evidence was equivocal. Pretext was not made out, nor could reasonable jurors properly have concluded that it was.

McDonnell Douglas is not a vehicle that permits a plaintiff to cast the burden of persuasion on the defendant and compel him to prove that his actions were nondiscriminatory. *See Sweeney v. Board of Trustees of Keene State College*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). Nor is it a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities. The inquiry is whether the plaintiff has been discriminated against because of his age; the ADEA proscribes no other conduct.

The record in this case establishes that the plaintiff-appellees were in the ADEA's protected age group, that most were qualified, and that they were terminated and (except for one) replaced by younger employees. It carries the plaintiffs no further. Group Hospital offered an adequate ground other than age for the discharge of each. In rebuttal, each appellee advanced little if anything more than his belief that age caused his discharge rather than the reason given by the employer. We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief. *See Houser v. Sears, Roebuck & Co.*, 627 F.2d 756 (5th Cir. 1980). Nor are we prepared to lay it down that because an employee is performing his job adequately, an employer is prohibited from replacing him with one whom he subjectively believes will do a better job. Were we to do so, we would go far to insure that an employer could do nothing to correct unsatisfactory performance in senior management, most of which will always be within the ADEA's protection. Even had the reasons articulated here been frivolous or capricious, had they been the genuine causes of these discharges they would have defeated liability under the ADEA. We reiterate: that statute proscribes only one reason for discharge—age. One who offers a frivolous or capricious reason, however, does so at heavy risk that it will be discounted. Con-

versely where, as here, the reasons articulated are rational ones, the objective truth of which is not seriously disputed, the burden of establishing them as pretextual is a heavy one indeed. As we have heretofore held in *Houser*, *supra*, it is not discharged by general avowals of belief, however sincere, that age—rather than an established adequate reason—was the real reason for the termination. More is required, perhaps a successful statistical demonstration by expert testimony, perhaps proof that others similarly situated were not discharged. Such proof is lacking here; and as to this, the verdict lacks rational support in the record. Since it does, and since the element of pretext was critical, the verdict cannot stand.

Because we hold that the evidence was insufficient to support the jury's finding of age discrimination we need not address the issues of attorneys' fees, liquidated damages or the supersedeas bond. We leave it to the district court to fashion a decision consistent with this opinion.

Accordingly, the judgment of the district court is reversed and the cause remanded.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 9-16-83, 5 Cir., 198—, —— F.2d ——)

(November 25, 1983)

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-79-2179

JACK ELLIOTT, *et al.*

VS.

GROUN HOSPITAL SERVICE, INC., *et al.*

FINAL JUDGMENT

On the first day of July 1981, came to be heard the above-styled and numbered cause, and all parties having announced ready for trial, a jury was drawn and impaneled, and after the jury was sworn, evidence was introduced by Plaintiffs. When Plaintiffs rested, the Defendants, Group Medical and Surgical Service, Inc., and Group Life & Health Insurance Company moved that the Plaintiffs' cause of action against them be dismissed. The motion was granted. Defendant, Group Hospital Service, Inc., introduced evidence and then Plaintiffs introduced evidence in rebuttal. The Court finds that Plaintiffs Eliott and Galen timely filed their notice of intent to sue, *Delaware State College v. Ricks*, —— U.S. ——, 101 S.Ct. 498 (1980); *Payne v. Crane Co.*, 560 F.2d 198 (5th Cir. 1977), and that Plaintiff Heffer also timely filed his notice of intent to sue. *Charlier v. S.C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977).

The issues in the case were submitted to the jury upon Special Verdicts which were answered by the jury as follows:

1. Do you find from a preponderance of the evidence that the Defendant discriminated against the following Plaintiffs by discharging them from their employment on the basis of age?

Answer "Yes" or "No."

(1) Jack Elliott	Answer:	*Yes*
(2) Richard Galen	Answer:	*Yes*
(3) Max Tipton	Answer:	*Yes*
(4) George "Don" Spradley	Answer:	*Yes*
(5) Duane Thompson	Answer:	*Yes*
(6) Robert Heffer	Answer:	*Yes*

For each Plaintiff for whom you have answered "Yes," answer questions 2 and 3.

2. What sum of money do you find from a preponderance of the evidence will compensate each Plaintiff for the economic losses he has incurred?

Answer in dollars and cents.

(1) Jack Elliott	Answer:	*$262,814*
(2) Richard Galen	Answer:	*$191,967*
(3) Max Tipton	Answer:	*$208,175*
(4) George "Don" Spradley	Answer:	*$102,689*
(5) Duane Thompson	Answer:	*$ 59,357*
(6) Robert Heffer	Answer:	*$205,632*

3. Do you find from a preponderance of the evidence that the discharge of the following Plaintiffs was "willful."

Answer "Yes" or "No."

(1) Jack Elliott	Answer:	*Yes*
(2) Richard Galen	Answer:	*Yes*
(3) Max Tipton	Answer:	*Yes*
(4) George "Don" Spradley	Answer:	*Yes*
(5) Duane Thompson	Answer:	*Yes*
(6) Robert Heffer	Answer:	*Yes*

4. Do you find from a preponderance of the evidence that the Defendant failed to post the required notice

about the Age Discrimination in Employment Act at Robert Heffer's place of employment—that is, at the Houston District office?

Answer "Yes" nor "No."

Answer: *Yes*

The Special Verdict Form was dated July 8, 1981, and signed by the foreperson, Harold C. Chevalier.

The Court having received the verdict of the jury and having considered the jury's answers to the Special Verdict Form, the Court concludes that the Plaintiffs are entitled to have judgment against Group Hospital Service, Inc., and that the Plaintiffs are entitled to an award of attorneys' fees and expenses. The parties have stipulated that the Court would determine the amount of the attorneys' fee award upon fee petition submitted by Plaintiffs' counsel, and the Court having considered the fee petition in light of the standards set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), is of the opinion that Plaintiffs are entitled to an award of attorneys' fees and expenses in the amount of $96,607.50 as fees and $5,494.55 as expenses, on the basis of the information contained in the affidavits submitted by Plaintiffs' counsel.

The Court in its discretion, declines to award liquidated damages to the Plaintiffs. *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976).

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court as follows:

(1) Plaintiffs do have judgment for and recover from the Defendant, Group Hospital Service, Inc., the following sums:

Jack Elliott	$262,814
Richard Galen	$191,967
Max Tipton	$208,175
George "Don" Spradley	$102,689
Duane Thompson	$ 59,357
Robert Heffer	$205,632

(2) Plaintiffs do have judgment for and recover from the Defendant, Group Hospital Service, Inc., reasonable attorneys' fees in the amount of $96,607.50, plus reasonable expenses in the amount of $5,494.55.

(3) Costs of Court are taxed against Defendant, Group Hospital Service, Inc.

(4) All Plaintiffs' causes of actions against Defendants, Group Medical and Surgical Service, Inc., and Group Life & Health Insurance Company are dismissed with prejudice.

(5) The total amount of the judgment, including the Plaintiffs' recoveries and attorneys' fees and expenses shall bear interest at the legal rate from the date hereof until paid in full.

(6) None of the Plaintiffs shall be reinstated.

(7) For recovery of which amounts, let execution issue if this judgment is not timely paid.

SIGNED and ENTERED this 20th day of July 1981.

/s/ George E. Cire
GEORGE E. CIRE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

ORDER

[DENYING MOTION FOR JUDGMENT N.O.V.]

Before the Court is Defendant's Motion for Judgment n.o.v. and the Court has reviewed all the grounds and legal arguments advanced by Defendant. Because the Court holds that the evidence presented at trial of this case was of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the Defendant's motion should be denied. It is therefore

ORDERED that Defendant's motion for judgment n.o.v. be, and it is hereby, DENIED.

SIGNED and ENTERED this 20 day of July 1981.

/s/ George E. Cire
GEORGE E. CIRE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

ORDER

[DENYING MOTION FOR NEW TRIAL]

On July 20, 1981, this Court entered Final Judgment in this action, finding for the Plaintiffs against the Defendant Group Hospital Services, Inc., and ordering that Defendant pay certain sums to the Plaintiffs in damages, court costs, and reasonable attorney's fees. Plaintiffs then filed its motion to modify or amend the judgment and Defendant has moved for a new trial. After considering these motions and the arguments of both parties, the Court has concluded that the Final Judgment of July 20, 1981, should stand and that the motions of each party should be DENIED.

Accordingly, it is hereby ORDERED:

(1) Plaintiffs' motion to modify or amend the judgment is DENIED;

(2) Defendant's motion for a new trial is DENIED.

SIGNED and ENTERED this 1st day of September 1981.

/s/ George E. Cire
GEORGE E. CIRE
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. A-647

JACK ELLIOTT, *et al.*,
Petitioners,

v.

GROUP MEDICAL & SURGICAL SERVICE, INC., *et al.*
and GROUP HOSPITAL SERVICE, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 17, 1984.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 14th day of February, 1984.

NO. 83-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JACK A. ELLIOTT, RICHARD GALEN, ROBERT W. HEFFER, GEORGE D. SPRADLEY, MAX TIPTON and C. DUANE THOMPSON,
Petitioners

V.

GROUP HOSPITAL SERVICE, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN F. MCCARTHY, JR.
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QUESTIONS PRESENTED FOR REVIEW BY PETITIONERS

1. Whether, in an employment discrimination case, the testimony of an employer official that the challenged employment decision was prompted by a non-discriminatory reason must be accepted absent "countervailing evidence that it was not the real reason for the discharge." (Stated otherwise, whether, in an employment discrimination case, the fact-finder (here the jury) is permitted to reject the uncontradicted testimony of an interested employer witness on the basis of its assessment that the witness is not credible.)

2. Whether, in an age discrimination case, evidence that an employer has dismissed a number of highly qualified older employees and replaced them with much younger employees may be considered by the fact-finder, in the absence of a showing that as a matter of probability the pattern is "statistically significant."

3. Whether, in an employment discrimination case, where the plaintiff has introduced evidence establishing a prima facie case and an official of the defendant employer testifies to a facially-rational non-discriminatory reason for the challenged employment decision, the plaintiff bears a "heavy burden" of proof that the proffered reason is pretextual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. 83-1536

JACK A. ELLIOTT, RICHARD GALEN, ROBERT W. HEFFER, GEORGE D. SPRADLEY, MAX TIPTON and C. DUANE THOMPSON,

Petitioners,

V.

GROUP HOSPITAL SERVICE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pursuant to Supreme Court Rule 22, Respondent Group Hospital Service, Inc.[1] submits its Brief in opposition to Petitioners' Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The Respondent respectfully moves this Court to deny the petition for the review of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 16, 1983, on grounds that the decision of the Court of Appeals represents a proper application of law to the facts in this case and that Petitioners have raised no issues that merit review by this Court.

[1] Effective December 15, 1983, Group Hospital Service, Inc. changed its corporate name to Blue Cross and Blue Shield of Texas, Inc. The Respondent is affiliated with a statewide mutual assessment company known as Group Medical and Surgical Service, d/b/a Blue Shield of Texas. (Supreme Court Rule 28.1)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered in this case on September 16, 1983. The Petitioners thereafter filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, both of which were denied by the Circuit Court on November 25, 1983. Petitioners have sought a review of the decision of the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, are as follows:

Section 4(a)(1), 29 U.S.C. § 623(a)(1):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12(a), 29 U.S.C. § 631(a):

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

This Court's procedural rules indicate that in a responsive brief no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement by the other side (Rule 34.4). In this case Petitioners bluntly assert that the Court of Appeals for the Fifth Circuit mischaracterized the record evidence as a means of justifying its ultimate finding that the quality and probative

force of such evidence was patently insufficient to support Petitioners otherwise bald allegations of age discrimination (Petitioners' Brief, page 28, footnote 17). This element of denigration of the Court of Appeals' evaluation of the evidence is unfounded and inappropriate. In their statement of the case Petitioners assert at the outset that they are entitled to a liberal review of the issue of the sufficiency of evidence presented at the district court level, and they thereafter proceed to offer a rendition of purported facts in evidence that could only be characterized as not only liberal, but at times inaccurately self-serving. The Respondent is thus compelled to at least note and reply to specific inaccuracies.

The Petitioners' statement of the case does not challenge the Circuit Court's finding that there was no direct evidence of age discrimination offered by Petitioners at trial (App. 17a).[2] Petitioners concede that the central theory of their case was premised upon allegations of the existence of a "scheme" on the part of the company to get rid of older employees within the Marketing Division and replace them with younger employees (Petitioners' Brief, page 23). This "scheme" was purportedly undertaken during the latter part of the year 1978 because the company's new president-elect, Walter Hachmeister, allegedly asserted that he wanted "new blood" in the Marketing Division and stated "my people are going to have to be lean and mean" (App. 17a). Hachmeister's testimony confirmed that he had used the phrase "lean and mean" in an attempt to urge the initiation of a more aggressive marketing approach—he wanted leaders who had the "ability to get things done" (Tr. 606-607, 898). The words "new blood," however, were attributed to Hachmeister solely by Petitioners (App. 17a).

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[2] For sake of convenience and accuracy, references to the Circuit Court's decision contained in this brief are keyed to the page numbers designated in the reproduction of the Appeal Court's decision reprinted in the appendix of Petitioners' Brief (i.e. Petitioners' Brief, Appendix, pages 1a through 22a).

Hachmeister characterized his perception of the health insurance sales efforts of the company as of the point in time when he was appointed president-elect as something akin to "... a rather placid status much like a large battleship that's anchored in a bay with anchors at both ends and just not going anyplace. ..." (Tr. 900). Hachmeister noted that the company's market penetration in Texas hovered around twenty percent; a figure that he sharply contrasted with other states where Blue Cross plans were selling as much as seventy to eighty percent of the market (Tr. 900).

In October, 1978, Hachmeister asked for the resignation of 43 year old health marketing Vice President Hugh Eller, and replaced him with 56 year old Jim Wilson, the Vice President who had headed the company's separate life insurance sales division (Tr. 913-914). Hachmeister gave Wilson a definitive goal—to increase the company's market penetration to fifty percent within five years (Tr. 917-918). Wilson characterized Hachmeister's directive as "startling"; he knew that the sales performance of the health marketing division had been "very average" for a number of years (Tr. 914-915, 918). Wilson likewise knew that it would not be easy to achieve Hachmeister's goals, and that he would have to move immediately to "put the proper leadership into key roles" (Tr. 918). Thus, the reorganization of the health side of the Marketing Division began (Tr. 918).

The statement of the case presented by Petitioners asserts that the evidence relating to the reorganization undertaken by Wilson clearly reflected a "pattern" of age discrimination. A reader of the statement is led to believe that there were ten executives who worked within the company's marketing hierarchy who were replaced under circumstances giving rise to an inference of age as a motivating factor. A portion of Plaintiffs' Trial Exhibit 141-A is reproduced in the text of Petitioners'

statement of the case in furtherance of Petitioners' pattern of motive argument (Petitioners' Brief, page 3).[3]

Petitioners inaccurately assert that ten executives within the age group protected by the A.D.E.A. were fired, and that six (6) of the terminated individuals (i.e. all six Petitioners) were replaced; each purportedly being replaced by a younger man (Petitioners' Brief, page 3). In truth, of the executives listed as being terminated in Petitioners' exhibit the undisputed evidence demonstrates that health division marketing Vice President Hugh Eller, age 43, was succeeded by 56 year old life division Vice President Jim Wilson. Petitioner Galen, age 48,[4] was not replaced in his job as Eller's Assistant Vice President by 33 year old Tom Slack. Wilson divided Galen's job duties between Slack and 41 year old Bob Verplank (Tr. 925). Verplank was placed in charge of Galen's administrative responsibilities, while Slack was charged with responsibility for field sales operations (Tr. 925). Petitioner Galen conceded on cross-examination that he was aware of the division of his duties following his departure from the company (Tr. 123). Wilson had chosen Slack to head up field sales operations because Slack had an extremely successful sales track record over a ten year period of employment with the company (Tr. 919). In fact, Galen himself had promoted Slack through a series of significant field sales jobs; first to the District Sales Manager's

[3] The reason the complete exhibit is not reproduced is evident. The exhibit admitted at trial lists District Sales Managers. It reflects the fact that 12 of the company's 21 District Sales Managers were over the age of 40. Petitioner Heffer, at age 41, was the youngest District Sales Manager in the protected age bracket. District Sales Managers Williams (age 58), Craft (age 58), Stevens (age 51), Clark (age 48), Moore (age 47), Landrum (age 46), Evans (age 46), Crawford (age 46), Rucher (age 44) and Posey (age 43) all managed to survive the "scheme" or "pattern" espoused by Petitioners in their statement of the case.

[4] Petitioner Galen's date of birth is October 26, 1929 (Tr. 7). At the time that Wilson asked for Galen's resignation Galen was 48 years of age, not 49 as reflected in the text of Plaintiff's Exhibit 141-A.

job in Tyler, and thereafter to the Regional Sales Manager's job in San Antonio (Tr. 137, 139). Although in the case of each promotion Slack replaced managers that were approximately twelve to fourteen years his senior in age, Petitioner Galen emphasized that his decisions were not influenced by age—in each instance Slack was well qualified and merited the job (Tr. 138, 140).

At the Regional Sales Manager's level, Petitioner Jack Elliott, age 50, was in fact replaced by Royce Barron, age 34 (Tr. 24). This move, however, did not set any notable precedent in terms of variations in age between an incumbent and successor. Elliott conceded that his own promotion to the Regional Sales Manager's job in Houston involved the demotion of an individual named Bill Lockhart who had been twelve to fifteen years his senior (Tr. 304-305). As of October, 1978, Barron had been with the company in field sales capacities for over ten years; he held the Dallas North District Sales Manager's job prior to assuming Elliott's duties in Houston (Tr. 675-676).

In Dallas, Regional Manager Merle Owens, age 45, was replaced by 42 year old Paul David; hardly a move that could give rise to an inference of age discrimination.

Wilson's plan for the reorganization of the company's field marketing efforts called for the consolidation of the existing Austin and San Antonio regional offices, with the consolidated region to be based at the larger San Antonio location (Tr. 933). Austin Regional Sales Manager Lutz was offered the opportunity to stay in Austin in the capacity of a District Sales Manager (Tr. 933-934). Lutz turned down Wilson's proposal and resigned (Tr. 933).

In the category of District Sales Managers [not a classification listed in Petitioners' exhibit], Petitioner Heffer, age 41, was terminated as Houston North District Manager and replaced by Mike McGuire, age 35 (Tr. 220). The placement of McGuire as Houston North District Sales Manager constituted a lateral

transfer; McGuire had been functioning as District Manager of the company's Beaumont office (Tr. 683).

The Petitioners apparently assert that the termination of District Sales Manager Hollis should be included in the alleged "pattern" described in their statement of the case. Although Hollis is listed as a terminated District Sales Manager in the text of Plaintiffs' Trial Exhibit 141, Petitioners offered no testimony at trial concerning either the circumstances of Hollis' termination or the age of his replacement, if any. Thus, no valid inferences can be drawn from the termination of District Sales Manager Hollis.

At the company's Dallas headquarters office, changes were made in marketing staff positions. Petitioner Don Spradley, Manager of National Accounts, and Petitioner Duane Thompson, Sales Training Director, were terminated. Spradley, age 53, was replaced by Pat Patrick, age 39, while Thompson, age 48, was replaced by Ed Hulsey, age 36.

Petitioner Max Tipton stipulated that his situation was not part of any reorganization; he was discharged during the month of February, 1979, by field operations AVP Slack in an office space gerrymandering controversy; however, the termination decision was subsequently rescinded by Wilson, and Tipton was offered the alternative of accepting a demotion to sales representative or resigning (Tr. 473, 998). Tipton ultimately resigned; his position as Abilene Regional Sales Manager was not filled by 43 year old Jerry Bagwell. Rather, the Abilene regional office was closed and its functions consolidated with Bagwell's existing regional sales office headquartered in Lubbock (Tr. 949, 954).

Based on the foregoing, it becomes evident that the "pattern" described by Petitioners in their statement of the case has been drastically overstated; the facts in evidence do not match the Petitioners' expansive characterizations. Only Petitioners Elliott, Thompson and Spradley were undisputedly

replaced by younger employees. Petitioner Galen's job responsibilities were split, although it is conceded that the individuals who were given such responsibilities were younger than Galen. Sales Vice President Eller was replaced by an older employee, clearly a definitive break in the "pattern." Regional Managers Lutz and Tipton were not replaced, while Regional Manager Owens and Petitioner Heffer were replaced by employees that were only marginally younger (i.e. three and six years respectively).

The "pattern" analysis contained in the Petitioners' statement of the case also urges this Court to virtually ignore the obvious. It was undisputed that it had long been the practice of the company to promote from within its sales organization—the anticipated result of nearly all displacements would be the elevation of a younger employee in place of the incumbent. Under such circumstances, the weight, if any, to be attached to the "pattern" argued by Petitioners becomes minimal. As noted by the Court of Appeals, each Petitioner must carry his burden of persuasion by true evidence of discriminatory intent, not hollow exhortations (App. 20a).

Petitioners have offered their own rendition of the reasons for their terminations within the text of Petitioners' statement of the case. However, in many instances, the version of the facts offered by Petitioners contain significant omissions. The Respondent offers a brief summary of the record evidence and findings of the Court of Appeals relating to the reasons for the Petitioners' terminations as follows:

Marketing Vice President Jim Wilson asked for the resignation of Assistant Vice President Galen because he felt that Galen's good attributes were outweighed by his lack of loyalty (Tr. 921, 975). Specifically, Wilson felt that Galen, "... was too dedicated to Dick Galen's welfare as opposed to the welfare of the corporation." (Tr. 975). Wilson had learned from Walter Hachmeister that Galen had sought Hugh Eller's job while Eller was still Galen's boss (Tr. 923). Galen admitted

that he had, in fact, approached Walter Hachmeister with a "resume" of things he would do within the Marketing Division, "... if it were true that he [Eller] was going." (Tr. 96). Wilson stated that his request for Galen's resignation was keyed, in material part, to the undisputed fact that Galen had been, "... moving in a little too quick" [on Eller] and effectively "undermining his boss" (Tr. 923-924, 975). Galen conceded that before Wilson asked for his resignation many "political things" were discussed—in particular, Wilson wanted to know if Galen had in fact gone to Hachmeister concerning the possibility of ascending to Eller's job (Tr. 110-111). Wilson considered Galen's tenure, not his age, in weighing the decision to ask for Galen's resignation (Tr. 925-926). This testimony meshed with Galen's admissions on cross-examination that there was no mention by anyone of his being "too old" to do the job (Tr. 121). Petitioner Galen did not take the stand to present evidence that the reasons cited by Wilson for his discharge were pretextual in nature.

Petitioner Elliott surmised that his discharge came because, "... I guess I was just getting too old." (Tr. 293, 303). This supposition was offered despite Elliott's admissions that nothing concerning his age had ever been stated to him by individuals such as Hachmeister, Wilson or Slack (Tr. 333). On rebuttal, Jim Wilson testified that he approved the plan to reorganize the field marketing staff, with the design being to put "proper leadership into key roles," particularly in the critical Dallas and Houston market areas (Tr. 918). In Dallas, Regional Manager Merle Owens was terminated because, in Wilson's view, Owens simply did not have the, "drive, nor the initiative to really take that particular office ... and make them produce." (Tr. 927). In Houston, the reasons for Elliott's termination were the same. Wilson stated, "I do not feel that he [Elliott] was as productive as he could have been . . . " and "... Jack could have done a better job than he had done." (Tr. 929, 932). Wilson's perception of Elliott's lack of productivity was supported by undisputed evidence. Although the Houston region had far

exceeded its assigned quota during the year 1977 thanks to the sale of the Houston Independent School District account, the company's market penetration in Houston was only five to six percent (compared to a state-wide market penetration of twenty percent) (Tr. 681, 697). By the time Royce Barron was assigned to assume Elliott's duties in Houston as of late October, 1978, the region was devastatingly behind in attainment of its assigned quota, and the undisputed evidence showed that the year 1978 ended with the Houston region attaining only fifty-five percent of its assigned quota (Defendant's Trial Exhibit 33, Attachment "A" Region II). Petitioner Elliott offered no evidence of pretext, and in particular did not address the content of Defendant's Exhibit 33, or speak to the issues raised by Wilson and Barron concerning his region's market penetration and productivity as of the year 1978.

Petitioner Heffer testified that he felt that he was terminated from his job as the Houston North District Manager by Royce Barron due to his age because, "... they were looking for a young team." (Tr. 245). On cross-examination, however, Heffer conceded that Barron had never mentioned his age as being a factor (Tr. 263). In fact, Heffer conceded that Plaintiffs' Trial Exhibit 141 revealed that there were ten district managers elsewhere in the state who were older than him (Tr. 264). Royce Barron testified that it was clear to him from the moment he arrived in Houston that Heffer felt that the Houston Regional Manager's job should have gone to Heffer, not Barron (Tr. 687-688). As a result, Barron found Heffer's attitude toward him to be, "... standoffish, cold, unresponsive, and even a bit uncooperative." (Tr. 686, 724). Since Barron had been charged with turning the situation in the Houston region around on an immediate basis, he felt that he did not have the luxury of time to change Heffer's attitude toward him (Tr. 688-689, 693). Barron stated that he did not consider Heffer's age in connection with the termination decision; in fact, he noted that the difference in age between Heffer and his replacement,

Mike McGuire, was minimal (i.e. McGuire was less than six years Heffer's junior in age) (Tr. 690).

Sales Vice President Wilson testified that he approved the recommendation of Assistant Vice President Carl Owens regarding the termination of Petitioner Spradley from the job position of Manager of National Accounts (Tr. 937). Wilson stated that he "... did not feel that Don [Spradley] had the capabilities to really do the job as well as he should in national accounts." (Tr. 937). Wilson had sought the opinion of several other individuals within the administrative organization of the company concerning Spradley's job performance because he had not worked directly with Spradley for a number of years (Tr. 937-938). It was an undisputed fact that during the three years preceding his termination Spradley had been transferred into and out of a total of four different job positions (Tr. 343). These jobs included Assistant Vice President of Marketing Services, Assistant Vice President of Actuarial Services, a "special project" assignment, and, finally, a demotion to Manager of National Accounts. Petitioner Spradley conceded on cross-examination that his career with the company had been on a rocky foundation for a number of years; in fact, Spradley had not received a written evaluation of his job performance since July of 1975 (Tr. 348). Spradley further admitted that Jim Wilson's predecessor, Health Marketing Vice President Hugh Eller, had been critical of his job performance as Manager of National Accounts—Spradley confirmed that Eller criticized him for not being "more enthusiastic about the job" and admitted that Eller asked him to "provide better leadership" in the position (Tr. 381-382). On balance, Jim Wilson's opinion of Spradley's job performance during the years immediately preceding his termination simply mirrored Eller's criticisms (Tr. 937). Petitioner Spradley did not offer any testimony whatsoever to indicate that the criticisms that existed of him in the job of Manager of National Accounts were pretextual in nature.

Petitioner Thompson was Sales Training Director at the time of his termination (Tr. 408-409). Marketing Vice President Jim Wilson testified that he held the opinion that the existing sales training program, which was the responsibility of Thompson, "... was not anywhere as good as it should have been." (Tr. 939). Even Petitioner Galen conceded on cross-examination that, "... it is fair to say that we felt we needed to improve our sales training." (Tr. 152). On cross-examination, Thompson admitted that the sales training program had "really been neglected," and that he "was going to recommend many changes" to "revitalize the program" (Tr. 438, 461). Petitioner Thompson offered no evidence of pretext. Instead, he testified that he had prepared written proposals for the "revamping" of the sales training program as of approximately August, 1978 (Tr. 1055-1056). These ideas were purportedly submitted to AVP Bob Verplank during the fall of 1978; however, Verplank allegedly said that if the proposed training program contained any of Galen's ideas Thompson could just "trash them" (Tr. 1056). This sent Thompson "back to the drawing board," and he was allegedly devising a "second program" at the time of his termination (Tr. 1056). Marketing Vice President Wilson denied that Thompson's age was a factor in requesting Thompson's resignation (Tr. 939-940). After Thompson's termination, Wilson arranged to have the sales training budget increased, and a new program was developed which represented a "dramatic improvement" in Wilson's view (Tr. 942).

Petitioner Tipton conceded that his situation was not part of the reorganization of the Marketing Division; Tipton was terminated because he had undisputedly violated company policy by having a contractor who was remodeling his new regional offices leave out a wall, producing the twin effect of enlarging his personal office beyond the square footage permitted by the company for an employee of his rank and eliminating the employee's lounge (App. 20a). Although Petitioner Tipton testified that he felt as though his immediate

supervisor, Assistant Vice President Galen, had approved his proposed "revision" of the Abilene regional office floor plan, the testimony of Co-Petitioner Galen did not conform with Tipton's supposition. Instead of indicating that the "revision" had been approved, Petitioner Galen stated that his words were, "... well, you know, try it and we will see," or, "... if it flies, let it go through" (Tr. 129, 132). Marketing Vice President Jim Wilson testified that it had long been company policy that any changes to building plans had to be approved and signed off by the vice president of the division involved; AVPs such as Galen would not have the authority to approve such changes (Tr. 994). This was a fact that neither Galen nor Tipton challenged. The most damaging testimony to Tipton's cause came when the company offered Defendant's Trial Exhibit 37, and attachments, indicating that Tipton had approved and accepted the leasehold premises in Abilene containing a layout or floor plan with a separate employees' break room, a conference room, and a standard sized regional manager's office as of January 19, 1979; this was long *after* Galen had left the company (Tr. 994). Plaintiff Tipton offered no true evidence of age discrimination whatsoever. On rebuttal, he did not challenge the issue of the necessity of receiving approval from a full vice president to change a floor plan, nor did he address the obvious inferences raised by Defendant's Trial Exhibit 37.

The analysis of the state of the record evidence regarding the testimony of the Respondent's expert witness is also inaccurately assessed in Petitioners' statement of the case. While Petitioners correctly characterized the approach taken by Dr. Schucany and his findings, they inject disparaging remarks relating to his study by stating, "... the expert acknowledged that his analysis took no account of the ages of those who *replaced* the terminatees, and thus reflected nothing as to the probability of the random occurrence of *both* eight terminatees all being over 40 *and* their replacements being substantially

younger" (Tr. 883) (Petitioners' Brief, page 9). The Respondent states that it would have been of little value to have asked Dr. Schucany to run the test now belatedly contemplated by Petitioners because it is undisputed that the record evidence has *never* reflected the existence of eight "terminatees" who were replaced by eight "substantially younger" employees. As previously noted, of the eight employees in question, one (Eller) was replaced by an older employee, two (Lutz and Tipton) were not replaced, and one (Merle Owens) was replaced by an individual less than three years his junior. Thus, the statistical survey Petitioners apparently urge via their criticism of the approach of the Respondent's expert could not possibly be justified by the undisputed facts in evidence in this case.[5]

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[5] At another point in their brief, Petitioners argue for the inclusion of District Managers in a statistical analysis; matching their own "off the record" findings with a comment by the Circuit Court that is clearly not the basis of any conclusion regarding sufficiency of the evidence in this case (Petitioners' Brief, page 22, footnote 14). The analysis advanced by Petitioners is flawed from its inception because it ignores the undisputed evidence in this case, as well as the reasons why the Court of Appeals gave no particular weight to the testimony of Dr. Schucany. Of the ten terminations cited by Petitioners, at least six occurred under circumstances wherein there is no evidence supporting at least an initial inference of age discrimination (i.e. the replacement of a protected age bracket employee with a substantially younger individual). In short, the "numbers game" perpetrated by Petitioners has no foundation in either logic or proof.

ANALYSIS OF QUESTIONS PRESENTED FOR REVIEW BY PETITIONERS

Petitioners' First Question Restated

1. Whether, in an employment discrimination case, the testimony of an employer official that the challenged employment decision was prompted by a nondiscriminatory reason must be accepted absent "counter-vailing evidence that it was not the real reason for the discharge." (Stated otherwise, whether, in an employment discrimination case, the fact-finder (here the jury) is permitted to reject the uncontradicted testimony of an interested employer witness on the basis of its assessment that the witness is not credible.)

At the outset, it should be stated that Petitioners have mischaracterized the holding of the Court Appeals relating to this issue. Petitioners assert that the recognized province and function of a jury to weigh the credibility of witnesses was invaded by the Court of Appeals because it purportedly held that when a management representative of an employer takes the stand to testify to reasons for a discharge decision, "... that person's testimony that an innocent reason motivated an employment decision *must* be credited in the absence of 'counter-vailing evidence that it was the real reason for the discharge.'" (Petitioners' Brief, p. 18) (emphasis added).

Contrary to the Petitioners' contentions, the actual holding of the Court of Appeals was that in the absence of direct evidence of discriminatory treatment, a trier of fact is not free to disregard a rational non-discriminatory reason for a discharge decision, the basis of which is not seriously disputed or challenged by the plaintiff (App. 17a, 19a-20a).

The Court of Appeals specifically indicated that its analysis in this case was undertaken in compliance with the standards of proof delineated by this Court in *United States Postal Service Board of Governors v. Aikens*, U.S. , 103 S.Ct. 1478,

75 L.Ed.2d 403 (1983) (App. 15a). The holding of the Court of Appeals in this case is based upon a relatively simple and straightforward premise: a plaintiff who offers nothing more than a subjective belief that his discharge was the result of age discrimination and thereafter does not undermine or challenge rational reasons articulated by his employer for his termination has not presented evidence that justifies a submission to the jury for resolution of controverted fact and credibility issues. In fact, when a plaintiff fails to effectively challenge his employer's proffered reasons for a discharge decision and concedes instead, as in this case, the truth of the reasons stated by the employer, the plaintiff's evidence is patently insufficient to warrant an inference of discrimination under standards of proof enunciated by this Court in both *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *United States Postal Service Board of Governors v. Aikens, supra.*[6]

There is no misapplication of the facts of this case to the law. Nor is there an element of the invasion of the province of the jury. The Court of Appeals simply weighed the evidence presented by Petitioners as it stood at the conclusion of this case and found:

> "... none seriously disputed either his awareness of or the objective truth of the company's stated ground of dissatisfaction with him, maintaining only that it was inadequate to warrant his termination. * * * Pretext was not made out, nor could reasonable jurors properly have concluded that it was." (App. 20a)

This Court's decision in *Texas Department of Community Affairs v. Burdine, supra,* requires more of a plaintiff than the Petitioners brought forward in this case. Under the requisites of

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[6] The Petitioners' argument regarding this issue is linked to the premise that the employer has presented only "otherwise uncorroborated testimony" (Petitioners' Brief, page 14). In fact, this premise is critical to Petitioners' argument. Here, however, the corroboration of the testimony of the company's witnesses came from Petitioners themselves (App. 20a-21a).

Burdine Petitioners could have succeeded in presenting proof of pretext necessary to justify submission of the case to a jury by offering rebuttal evidence showing either direct proof of discriminatory intent and motive, or indirect evidence showing that the employer's proferred explanation was unworthy of credence. *See Burdine,* 450 U.S. at 256, 101 S.Ct 1093, 67 L.Ed.2d 217. Instead, Petitioners offered nothing, with the Court of Appeals correctly noting:

> "In rebuttal, each appellee advanced little if anything more than his belief that age caused his discharge rather than the reason given by the employer. We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief. *See Houser v. Sears, Roebuck and Co.,* 672 F.2d 756 (5th Cir. 1980). (App. 21a)

The Petitioners incorrectly assert that the Court of Appeals' decision in this case parallels the Fifth Circuit's treatment of the subject of sufficiency of evidence of anti-union motivation which was struck down by this Court in *N.L.R.B. v. Walton Mfg. Co.,* 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962). This Court's decision in *Walton Mfg. Co., supra,* has no application to this matter; it represents a review of the Fifth Circuit's handling of a labor board case under the substantial evidence rule criteria of the Supreme Court's decision in *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

In *Walton* this Court admonished the Court of Appeals that in the context of the review of a decision of an administrative agency a Circuit Court does not have the prerogative to substitute its analysis of the evidence for that of the agency so long as the Board's view is supportable by substantial record evidence. *Walton* thus speaks to the issue of deference to the Board's expertise in resolving the credibility of witnesses whose testimony is in sharp dispute; clearly not an issue in this case wherein Petitioners have neither disputed the substance of the objective reasons stated by the employer for their terminations, nor offered evidence of pretext.

The Petitioners additionally assert that their petition in this case should be granted because the Court of Appeals' decision here purportedly conflicts with a District of Columbia Circuit Court decision styled *Carter v. Duncan-Huggins, Ltd.*, F.2d , 34 FEP Cases 25 (D.C. Cir. 1984). This contention is likewise clearly in error. The decision of the Court of Appeals for the District of Columbia in *Duncan-Huggins* represents a review of a District Court ruling which denied an employer's Motion For Judgment N.O.V. following an adverse jury verdict in a discrimination suit brought under The Civil Rights Act of 1866, 42 U.S.C. Section 1981. In weighing the sufficiency of the evidence supporting plaintiff Carter's favorable jury verdict, the Circuit Court found that during the course of trial plaintiff had offered largely undisputed evidence that she had been treated differently from similarly situated Caucasian co-workers in a variety of terms and conditions of employment, wages, and subjection to a racially derogatory anecdote under circumstances wherein the company's president was present and found the joke humorous. *See* 34 FEP Cases at 28, 30-31. Although the defendant employer denied a discriminatory motive in plaintiff's treatment, the Circuit Court concluded that there was more than enough conflicting evidence inferring racial discrimination to justify submission of the case to the jury; in fact, the Circuit Court found that the evidence tended to show that plaintiff was "treated uniquely" in all aspects of her employment. *See* 34 FEP Cases at 30.

In *Duncan-Higgins*, the Court of Appeals for the District of Columbia adopted the same standard for its review of the sufficiency of the evidence as the Court of Appeals for the Fifth Circuit did in this case. The standard involved called for plaintiff Carter to present proof of discrimination under the criteria of *Texas Department of Community Affairs v. Burdine, supra*, and *United States Postal Service Board of Governors v. Aikens, supra*. *See* 34 FEP Cases at 29. The difference between the result in *Duncan-Huggins* and this case lies in the state of the record evidence. In *Duncan-Huggins*, the Circuit Court

rightfully concluded that the employer's defensive statements simply articulated a "different version of the facts"; facts that were sharply disputed and which were correctly submitted to the jury for resolution. In this case, facts essential to a showing of pretext were never forthcoming from Petitioners (App. 21a). There were thus no facts raised by Petitioners herein which required a resolution of credibility by the jury. To the contrary, as noted in both the Respondent's statement of the case and the Circuit Court's decision, each Petitioner virtually stipulated to the truthfulness and accuracy of the reasons stated by the company for the termination decisions (App. 20a). Their assertions of age discrimination were based entirely upon a subjective belief in the existence of the "pattern" urged in Petitioners' statement of the case—a "pattern" which does not exist in the form Petitioners contend.

The Respondent would call to this Court's attention the fact that there have been at least two recent Circuit Court decisions wherein this Court has denied petitions for certiorari on points that should be considered nearly identical to those raised by Petitioners in this case. These cases are *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983), cert. denied, U.S. , 104 S.Ct. 1334 (1984), and *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983), cert. denied, U.S. , 104 S.Ct. 348 (1983). Both cases address the issue of the sufficiency of proof necessary to justify the submission of a case to a jury in an age discrimination lawsuit context. The observations offered by the Court of Appeals for the Eleventh Circuit in *Pace v. Southern Railway System, supra*, are particularly relevant:

> "A plaintiff, when faced with a motion for summary judgment, cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather must come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact. Even where a prima facie case has been established but the defendant has rebutted with a proffer of legitimate, non-

> discriminatory reasons for the discharge, a genuine issue of material fact is not automatically presented. As the Supreme Court noted in *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254 n. 7, 101 S.Ct at 1094 n. 7, once established a prima facie case creates a rebuttable presumption of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue." [701 F.2d at page 1390]

In *Pace*, plaintiff relied primarily on statistical studies that he argued inferred a "pattern" of age discrimination in demotion and transfer decisions of the company. As in this case, the Court of Appeals found the statistical evidence to be inconclusive, and looked to plaintiff to bear his ultimate burden of proof in offering at least some evidence of pretext as required by *Texas Department of Community Affairs v. Burdine, supra.*

The Third Circuit's decision in *Massarsky v. General Motors Corp., supra,* presents the same conclusion in a slightly different context. Plaintiff Massarsky argued for the application of a disparate impact theory in his case based on assertions that his layoff was the result of an age-biased policy that purportedly exempted young employees who were enrolled in the General Motors Institute (GMI). The Circuit Court concluded that whether plaintiff Massarsky was held to a disparate impact standard of proof or that of a disparate treatment theory was immaterial; plaintiff simply failed to carry his ultimate burden of proof.

Significantly, the Circuit Court decisions in both *Pace* and *Massarsky* also fully comport with the approach to this subject taken by the Court of Appeals for the Ninth Circuit in *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983), wherein the Circuit Court affirmed the grant of a motion for summary judgment—specifically rejecting plaintiff's argument that a summary judgment cannot be granted if a prima facie case is established. Following the principles of *Texas Department of Community Affairs v. Burdine, supra,* the Ninth Circuit correctly

concluded that, "... plaintiffs in ADEA cases must tender a genuine issue of material fact as to pretext in order to avoid summary judgment." [703 F.2d at 393].

Based on the foregoing, it should be found that the Court of Appeals for the Fifth Circuit correctly applied the law of this Court in reaching its conclusions regarding the sufficiency of evidence herein, and its conclusions should be implicitly affirmed by the rejection of Plaintiffs' question presented for review under this issue.

Petitioners' Second Question Restated

2. Whether, in an age discrimination case, evidence that an employer has dismissed a number of highly qualified older employees and replaced them with much younger employees may be considered by the fact-finder, in the absence of a showing that as a matter of probability the pattern is "statistically significant."

In similarity to question number one presented by Petitioners, this question deals with the alleged invasion of the province of the jury by the Court of Appeals in this matter. Specifically, the Petitioners contend that the Circuit Court has effectively ruled that evidence of an alleged "pattern" of action purportedly inferring discrimination may not be considered by the fact-finder (i.e. the jury) without accompanying evidence that the "pattern" has statistical significance (Petitioners' Brief, p. 25).

Once again, the Respondent is compelled to strenuously assert that Petitioners have mischaracterized the actual holding of the Circuit Court. The finding of the Court of Appeals relating to the testimony of the Respondent's expert witness was that his testimony, "... established only that age could neither be ruled in nor ruled out statistically as the factor leading to the discharges." (App. 18a). Although the Circuit Court noted that the expert testimony tended to undercut the theory that age was a determining factor in any of the employment decisions in this case, the Court constrained its actual finding regarding the probative value of the expert's testimony by indicating,

"... Schucany's testimony concerning his statistical model, as noted above, was that age could neither be accepted nor rejected as the determinative factor in the discharges." (App. 19a, n. 12).

Since the Court of Appeals' true finding concerning the probative value of the expert testimony was that "the statistical evidence was equivocal" it cannot reasonably be asserted by Petitioners that the statistical proof present in this case was used by the Court of Appeals to summarily reject the Petitioners' "pattern of discrimination" evidence (App. 20a). Contrary to the suggestion of Petitioners, the Circuit Court did not rely on either *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), or *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), in reaching any "conclusion" that "... it was improper to consider plaintiffs' evidence that the terminations were part of a pattern." (Petitioners' Brief, page 22). No such finding was made by the Circuit Court.

The Petitioners' argument relating to the second question presented for this Court's review seems to belie a misunderstanding of the proper allocation of the burden of proof in a discrimination case once all evidence has closed. Specifically, assuming arguendo that the "pattern" of age discrimination alleged by Petitioners has some probative value contributing to the establishment of a prima facie case, Petitioners must still carry their ultimate burden of proof in offering evidence, either directly or indirectly, that would tend to show that the reasons proferred by the employer for the employment decisions in question were pretextual in nature. The requirements of *Texas Department of Community Affairs v. Burdine, supra,* dictate that a plaintiff must challenge an articulated reason for an allegedly discriminatory decision. In this case, the fact that a number of older employees were replaced with younger employees is not sufficient, standing alone, to justify submission of the case to a jury under circumstances wherein each and every Plaintiff

failed to offer proof of pretext. Plaintiffs are essentially contending that the "pattern" they allege should be considered viable evidence of age discrimination in the absence of any other element of age discrimination in this case. This category of assertion flies in the face of logic. A mere statement of a belief in a "pattern" of discrimination must be viewed as a totally subjective allegation unsupported by true substantive evidence of discriminatory intent.

Petitioners urge this Court to grant a writ of certiorari regarding the issue raised by this question because the decision of the Court of Appeals in this case is allegedly in conflict with the decision of the Sixth Circuit in *Marsh v. Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981), and the decision of the Court of Appeals for the District of Columbia in *Carter v. Duncan-Huggins, Ltd.*, F.2d , 34 FEP Cases 25 (D.C. Cir. 1984). Neither Circuit Court decision cited by Petitioners has any bearing whatsoever on the decision of the Court of Appeals for the Fifth Circuit in this case. Specifically, neither case deals with the weight or sufficiency of statistically insignificant "pattern" evidence in the context of a plaintiff having offered absolutely no other probative evidence of discrimination, and, in particular, no evidence of pretext in attempting to carry the ultimate burden of persuasion under the criteria of *Texas Department of Community Affairs v. Burdine, supra.*

Marsh v. Eaton Corp., supra, involved a non-jury case wherein plaintiff raised allegations of sex discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* The District Court had concluded that plaintiff's statistical evidence did not establish a prima facie case of sex discrimination because the sampling produced by plaintiff was too small to allow valid inferences of discrimination. The Court of Appeals for the Sixth Circuit disagreed, and found that although plaintiff's statistical proof involved limited numbers, the plaintiff at least had established

a prima facie case of "channeling" new hires to their initial job assignments on the basis of gender. The Sixth Circuit reversed and remanded this portion of the case conditioned on admonitions to the District Court and the parties as follows:

> "The conclusion that Plaintiff has established a prima facie case of sex discrimination does not settle the case. The Defendant is free to rebut the inferences presented by these statistics. * * * Once Plaintiff establishes a prima facie case of sex discrimination, the burden shifts to Defendant to rebut Plaintiff's evidence. Accordingly, we reverse the District Court and remand to allow Defendants the opportunity to rebut the prima facie case through attack on the statistical foundation, evidence of business purpose or other rebutting evidence." [639 F.2d at p. 328-329]

Based on the foregoing, it is clear that *Marsh* is not a case that speaks to the probative value of "pattern evidence" deemed to be statistically insignificant. More importantly, *Marsh* does not speak to the role that "pattern" evidence should play, if any, in determining whether a plaintiff has met the ultimate burden of proof required of a plaintiff in an employment discrimination case as of the close of all evidence.

In *Carter v. Duncan-Huggins, Ltd., supra,* the Court of Appeals for the District of Columbia concurred with the District Court's conclusion that plaintiff's evidence of disparate treatment should not be labeled as "statistical" evidence because plaintiff Carter, "... did not abstract from these figures any statistical pattern or practice or calculate any subtle but discriminatory impact." *See* 34 FEP Cases at 32. As noted in response to Petitioners' first question presented for review, the jury verdict in favor of plaintiff in the *Duncan-Huggins, Ltd.* case was affirmed on the basis of the sufficiency of plaintiff's evidence at each and every stage of the inquiries relating to sufficiency of proof. The analysis of the case undertaken by the Court of Appeals for the District of Columbia comported fully with the requirements of both *Texas Department of Community*

Affairs v. Burdine, supra, and *United States Postal Service Board of Governors v. Aikens, supra.* Under any fair minded analysis, *Duncan-Huggins, Ltd.* has no application to this case because plaintiff carried her ultimate burden of proof.

The Respondent argues that recent Circuit Court decisions dealing with this issue include *Pace v. Southern Railway System, supra,* and *Massarsky v. General Motors Corp., supra,* both of which are cited and discussed in response to Petitioners' first question. In *Pace* the Court of Appeals for the Eleventh Circuit rejected the notion that statistically inconclusive evidence of an alleged "pattern" of discriminatory employer action should be allowed to go to the jury in the absence of a showing of pretext. This Court has refused applications for writs of certiorari in both *Pace* and *Massarsky;* the issues presented by Petitioners under this question are not new and should not be found persuasive.

In this proceeding whatever value the assertion of a "pattern" of age discrimination had in furtherance of Petitioners' prima facie case was literally destroyed by Petitioners' complete failure to challenge the reasons offered by the employer for the discharge decisions as being pretextual in nature. As noted in *Texas Department of Community Affairs v. Burdine, supra,* the burden is always on a plaintiff to carry the production of persuasive evidence. Once the trial reaches the third stage of proof wherein a plaintiff has the burden of producing evidence of pretext the factual inquiry "proceeds to a new level of specificity." (*Burdine,* 450 U.S. at 255). Here, the Court of Appeals found that pretext simply was not made out (App. 20a). Petitioners would apparently like for this Court to conclude that their bald allegations of a purported "pattern" of age discrimination should have been submitted, standing alone, to the jury notwithstanding the total absence of evidence of pretext. Plaintiffs would prefer that the evidence be treated in a piecemeal fashion, and assert that the Court of Appeals for the Fifth Circuit should be condemned for following the teachings

of *Burdine* and *Aikens* in analyzing the evidence as it stood at the close of the case. This Court should reject Petitioners' approach, and the denial of this question would serve to reaffirm the fact that the Circuit Court reviewed this case under the "same standards as those in other cases" as required by *Aikens*.

Petitioners' Third Question Restated

> 3. Whether, in an employment discrimination case, where the Plaintiff has introduced evidence establishing a prima facie case and an official of the defendant employer testifies to a facially-rational non-discriminatory reason for the challenged employment decision, the Plaintiff bears a "heavy burden" of proof that the proffered reason is pretextual.

The Respondent asserts that Petitioners' final question presented in connection with this application is offered more as a matter of form than real substance. Petitioners know that the Court of Appeals specifically stated in the text of its opinion that this case was measured "under the same standard as those in other cases" pursuant to the requirements of this Court's decision in *United States Postal Service Board of Governors v. Aikens*, U.S. 103 S.Ct. 1478, 75 L.Ed. 403 (1983) (App. 15a).

There is no ruling by the Circuit Court in this case that Petitioners were held to a "heavy burden" to prove pretext. In truth, the Circuit Court was never called upon to judge the probative quality of Petitioners' proof of pretext because there was none (App. 20a-21a). Under such circumstances, it cannot be fairly stated, as urged by Petitioners, that this case forges some new or especially onerous ruling regarding the sufficiency of proof of pretext in an employment discrimination case. The fact of the matter is that the decision of the Court of Appeals does not deal with any aspect of such a topic. Thus, Petitioners' third and final question raised for the proposed review of this Court should be rejected on the basis of lack of substantive merit.

CONCLUSION

The Respondent urges this Court to deny Petitioners' application in this matter based on findings that the Court of Appeals properly applied the law to the facts herein. Petitioners' questions presented for review do not raise substantive issues requiring resolution by this Court, nor does the decision of the Court of Appeals in this case conflict with that of any other Court of Appeals.

Respectfully submitted,

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No. 83-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JACK A. ELLIOTT, RICHARD GALEN, ROBERT W. HEFFER, GEORGE D. SPRADLEY, MAX TIPTON and C. DUANE THOMPSON,

Petitioners

v.

GROUP HOSPITAL SERVICE, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CASES

REPLY BRIEF FOR PETITIONERS

I.

In some instances, the "facts" recited by respondent are contrary to its own admissions at trial—e.g., the tortured efforts to suggest that petitioners Galen and Tipton were not replaced by younger persons (Br. Op. 5, 7).[1] In other instances, respondent's "facts" constitute generalizations that the jury could properly have regarded as of no probative value—e.g., that because respondent ordinarily "promote[d] from within" it was common for older officials to be succeeded by younger ones (Br. Op. 8).[2] In most instances, respondent has simply committed

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[1] Respondent's answers to interrogatories, in evidence before the jury, stated that petitioner Galen was replaced by Tom Slack (D. Ex. 31, p. 5). And respondent's highest-ranking witness testified at trial that petitioner Tipton was replaced by Jerry Bagwell (Tr. 966). Not surprisingly, the court below recognized that all six petitioners were replaced by younger persons (App. 4a, 17a-18a).

In contrast, Vice President Hugh Eller was not "replaced" by Jim Wilson, an older Vice President (Br. Op. 5, 14). The undisputed facts show that Eller was terminated without replacement, Wilson assuming Eller's responsibilities in addition to his own (Tr. 897, 912-914). Wilson himself was gone by the following year, replaced by the (by then) 34-year old Tom Slack (Tr. 602, 834-835, 998).

[2] Respondent's evidence consisted principally of a showing that when older persons retire they are succeeded by younger ones. That, of course, is hardly comparable to an unprecedented "purge" of ten older officials who wanted to remain, accompanied by the selection of some of the youngest of their subordinates to replace them. Respondent was able to identify only three prior instances—widely separated in time—when a management official had been involuntarily removed from his job, and in each instance the cause for removal was (unlike here) gross deliquency: repeated instances of sexual harassment in one case (Tr. 188, 199-200); threatening subordinates with physical harm in another (Tr. 135-136, 199); and falsifying company records in the third (Tr. 147).

Contrary to respondent's statement (Br. Op. 6), the record shows unqualifiedly that petitioner Elliott's advancement to the regional sales manager position did not involve "the demotion of" an older employee; Elliott simply promoted past the older employee, who was not considered for the promotion because he had serious health problems (Tr. 306, 330-31, 930-31).

the common error of reciting the version of facts most favorable to the party against whom the jury ruled, ignoring the evidence that supports the jury's verdict.[3] The record, viewed most favorably to petitioners (for whom the jury ruled), fully supports the factual recitation in the petition, as reference to the record citations therein will substantiate. And, of course, the record must be viewed from that perspective at the appellate stage.

II.

Respondent does not dispute that a trier of fact is free to disbelieve the uncorroborated testimony of an employer witness as to the reason that motivated him to discharge an employee even in the absence of "countervailing evidence that it was not the real reason for the discharge" (App. 20a).[4] Nor does respondent dispute that, as this Court has recently reminded, "[w]hen the testimony of a witness is disbelieved, the trier of fact may simply disregard it." *Bose Corp.* v. *Consumers Union of United States*, —— U.S. ——, 52 L.W. 4513, 4520 (April 30, 1984).

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[3] For example, respondent cites its president's (Hachmeister's) testimony that "the company's market penetration in Texas hovered around twenty percent; a figure that . . . contrasted sharply with other states where Blue Cross plans were selling as much as seventy to eighty percent of the market" (Br. Op. 4). But other testimony fixed respondent's market penetration at thirty percent, and the highest in any other state in the forty-fifty percent range (Tr. 101), and provided as well the explanation for the lower penetration in Texas: in some states (but not Texas) state laws authorized reduced hospital rates to Blue Cross plan-members, thus giving the Blue Cross provider an automatic sales advantage over its competitors that did not exist in Texas (Tr. 186-87). The record also shows that Hachmeister's plan to increase respondent's market penetration in Texas was to be accomplished by investing $50 million of respondent's reserves (Tr. 103, 188-89), thus dispelling any inference that petitioners could have achieved a higher penetration in the past with the resources that had been made available to them.

[4] In addition to the cases cited in the Petition at 15-18, see *Dace* v. *ACF Industries, Inc.*, 722 F.2d 374, 377 n.6 (8th Cir. 1983).

Nonetheless, respondent contends that the holding below is not erroneous, advancing two theories: (1) that petitioners did not "dispute" the grounds for termination assigned by respondent's witnesses; and (2) that even if the testimony of respondent's witnesses were ignored, the evidence introduced by petitioners, admittedly sufficient (as the court below held) to establish a prima facie case, was not sufficient to warrant an inference of age discrimination. The first theory is wrong as a matter of fact. The second highlights a central issue of law that underpins our first question presented, and that needs to be resolved by this Court.

1. Repeatedly, respondent asserts that at trial petitioners did not "challenge" or "dispute" the reasons for the terminations advanced by respondent's witnesses. (Br. Op. 15, 16, 17, 19).[5] That assertion is flatly wrong. Petitioners, having learned through pretrial discovery what reasons would be proffered by respondent's witnesses, anticipated and disputed those reasons in their opening testimony.[6] And petitioners subjected respondent's witnesses to extensive cross-examination as to the reasons, eliciting many admissions helpful to plaintiffs' case.[7] Finally, petitioners called seven rebuttal witnesses for the express purpose of disputing that the reasons for discharge were as claimed by respondent's witnesses.[8]

Respondent picks up on the court of appeals' observation that petitioners did not "seriously dispute" the "objective truth" of the events that respondent's witnesses pointed to as motivating the termination decisions (App.

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[5] See also *id.* at 9 ("Petitioner Galen did not take the stand to present evidence that the reasons cited by Wilson for his discharge were pretextual in nature") and at 10 ("Petitioner Elliott offered no evidence of pretext").

[6] Tr. 92-96, 184-85, 217-18, 246-48, 259, 309, 343, 410-11, 421-22, 437-40, 457-60, 462-63, 474-87, 494-95, 507, 532.

[7] E.g., Tr. 548-49, 551, 557-58, 567-68, 571, 578, 594-95, 597, 715-18, 721, 724, 726, 782-84, 806-07, 813, 978-79, 990, 997-98, 1000-02.

[8] 1009-62.

20a). But that observation misses the point. An employer motivated by impermissible considerations in making terminations, and searching for a pretext, is unlikely to proffer "reasons" that are constructed from whole cloth. In the case of every long-term employee, there will be *something* that can be seized upon as a "legitimate" reason for termination, the "objective truth" of which cannot be "seriously disputed." Thus, the plaintiff's undertaking will rarely be to prove that the reason advanced by the employer is a total fabrication; rather, it will be to prove that the asserted reason is not what truly motivated the employer. The plaintiff will attempt to persuade the trier of fact that in all the circumstances (including the strength of the employee's overall work record, the precise facts surrounding the reason asserted by the employer, and the demeanor of the employer witness in testifying about the employment decision) the testimony of the employer witness that the asserted reason was the real reason should not be believed.

That is what happened here. Each of the petitioners presented evidence that he was consistently evaluated by respondent as an outstanding employee—evidence that alone would suggest that a legitimately motivated employer would not discharge the employee for trivial reasons. And each presented evidence demonstrating that the reason assigned by respondent's witnesses was in fact trivial. From this factual predicate, petitioners invited the trier of fact to assess the demeanor—and ultimately the credibility—of the witnesses for respondent who testified that indeed they had terminated these outstanding employees for such trivial reasons.

For example, while petitioner Galen did not dispute that he had informed the new president, Hachmeister, that he would like to be considered for the vice presidency if it became vacant, he vigorously disputed that the circumstances of the conversation could have led Hachmeister to perceive that he was "disloyal" to the incumbent vice president—the ground asserted by respondent for his termination. Galen testified, without contradiction,

that he told Hachmeister that he was not seeking to displace the incumbent, and that he was speaking up only in the event that the rumors were true that the job was about to become vacant (Pet. 5).[9]

Similarly, while petitioner Thompson did not dispute that the sales training program had been "neglected" during the year preceding his termination and thus needed "updating," he vigorously disputed that this could have prompted respondent to terminate him. He testified (with corroboration) that, as respondent well knew, the reason the program had been neglected is that the company president had diverted him from the sales training program for several months to work on special assignments (Pet. 8).

Likewise, while petitioner Tipton did not dispute that he had omitted a wall in the remodeling of the regional office, he vigorously disputed that this could have prompted respondent to terminate him, testifying (with corroboration) that the omission of the wall had been authorized by his immediate superior subject to confirmation by higher management, and that he had made arrangements with the contractor for the wall to be installed without cost on two hours' notice should the tentative approval not be confirmed (a fact known by respondent at the time it fired him) (Pet. 6).[10]

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[9] The rumors Galen had heard were that the incumbent vice president was going to be promoted to senior vice-president (Tr. 184-85).

[10] Respondent's "damaging testimony" respecting Tipton's claim (Br. Op. 13) is in fact an irrelevancy. All that Tipton "approved and accepted" in D. Ex. 37 was the terms of the lease for the new premises, not any layout or floor plan (Tr. 510-12). Nor did Tipton at any time "stipulate[] that his situation was not part of any reorganization"—a statement made by respondent at Br. Op. 7 without record citation; at all times, Tipton has contended that his termination was a part of the same pattern of terminating older officials that embraced the other five petitioners.

Petitioners Elliott and Spradley likewise disputed the reasons proffered by respondent's witnesses by introducing testimony that showed those "reasons" to be unlikely grounds for terminating them (Pet. 5-6, 7-8). Spradley did not "concede[] on cross-examination

To hold that in this context "the jury is not free to disregard" the innocent explanation proffered by the employer—the precise holding of the court below (App. 20a)—is, as we showed in our opening brief, to deprive the trier of fact of its ordinary fact-finding role through the imposition of an erroneous principle of law. And, as most employment discrimination cases ultimately turn on the credibility of the employer's assertion that it was motivated by something that actually exists in the employee's work history, the principle of law announced by the court below will preempt the fact-finding function in the vast majority of such cases. Any employer, no matter how badly motivated, need simply search the employee's record for something that can be proffered as "the" reason for discharge. So long as that reason is not "irrational or idiosyncratic . . . on its face" (App. 20a) the trier of fact will not be free to disregard it, unless the plaintiff can secure an admission that the assigned reason is "a mere cover or pretext" (*id.*). For, absent such an admission, the only way to prove pretext is as petitioners did here (and as the court below held impermissible)—by demonstrating the unlikelihood that in all the circumstances a legitimately motivated employer would discharge an employee for the reason assigned and inviting the trier of fact to assess the credibility of the employer's witness who testifies to that explanation.[11]

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that his career with the company had been on a rocky foundation for a number of years"—another statement made in respondent's brief without record citation (Br. Op. 11).

Petitioner Heffner introduced evidence showing that the "reasons" proffered by respondent's witnesses were in fact constructed from whole cloth (Pet. 6-7).

[11] The court of appeals' statement that each petitioner "offered no more than conclusionary statements of age discrimination" (App. 20a)—"little if anything more than his belief that age caused his discharge" (App. 21a)—simply reflects the court's erroneous *legal* view that the evidence plaintiffs *did* introduce was not the kind of "countervailing evidence" required to overcome the testimony of employer witnesses (App. 20a).

2. The other proposition advanced by respondent for sustaining the decision below is that "once established a prima facie case creates a rebuttable presumption of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue." (Br. Op. 20, quoting *Pace* v. *Southern Railway System*, 701 F.2d 1383, 1390 (11th Cir. 1983), cert. denied, —— U.S. ——, 104 S. Ct. 1334 (1984)).[12] Respondent contends that even if the testimony of its witnesses is ignored, the evidence presented by petitioners—although sufficient to establish a prima facie case—is insufficient to support a factual inference of age discrimination.

As we explained in the petition (at 19-21), central to our position is that a plaintiff who has established a prima facie case has by definition introduced evidence sufficient to permit a factual inference of discrimination. The court below disagreed (App. 20a, citing and following *Reeves* v. *General Foods Corp.*, 682 F.2d 515, 521-523 (5th Cir. 1982)). The lower courts are in conflict on this point. The Ninth and Eleventh Circuits have agreed with the Fifth. *Steckl* v. *Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); *Pace, supra.* The Eighth Circuit has adopted the opposite view. *Wells* v. *Gotfredson Motor Co., Inc.*, 709 F.2d 493, 496 & n.1 (8th Cir. 1983).

At the root of this conflict is confusion over the meaning of this Court's analysis in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). The courts that believe that a prima facie case does not necessarily permit a factual inference of discrimination have drawn

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[12] Contrary to the assertion at Br. Op. 19-20, in neither *Pace* nor *Massarsky* v. *General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983), cert. denied, —— U.S. ——, 104 S. Ct. 348 (1983), was this Court presented the issue posed in the instant case. In *Pace*, the court of appeals affirmed a holding that the plaintiff had failed to establish a prima facie case, and the passage quoted by respondent was a dictum; in *Massarsky*, the court of appeals merely affirmed a jury verdict in favor of the defendant.

that conclusion from the following passage in *Burdine*, 450 U.S. at 254 n.7 [13]:

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* [*Corp.* v. *Green*, 411 U.S. 792 (1973)] should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

We believe that these courts have misread this passage. It is our submission that the passage should be understood as follows: a prima facie case creates not *merely* an inference (in which event the trier of fact would be "permit[ted]" *but not required* to rule in the plaintiff's favor if the defendant remained mute) but *also* a presumption (*requiring* the trier of fact to rule in the plaintiff's favor if the defendant remains mute). To read the passage as meaning that a prima facie case creates a presumption but *not* an inference would produce the anomalous result that, where defendants remain mute, plaintiffs could win employment discrimination cases although they never introduced evidence from which discrimination could rationally be inferred. That this Court did not intend that anomaly is, we suggest, evidenced by other portions of the *Burdine* opinion, as well as the later opinion in *U.S. Postal Service Bd. of Governors* v. *Aikens*, —— U.S. ——, 103 S. Ct. 1478 (1983). This Court stated in *Burdine* that evidence sufficient to constitute a prima facie case "give[s] rise to an inference of unlawful discrimination," 450 U.S. at 253. Once a prima facie case has been established, the employer must articulate its legitimate explanation "through the introduction of admissible evidence" (*id.* at 255; see also *id.* 255 n.9)—thus assuring that that explanation will be

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[13] See *Reeves*, 682 F.2d at 521-523; *Pace*, *supra*, 701 F.2d at 1391.

subject to scrutiny as to its credibility (*id.* at 255, n.10). And, after the employer has introduced its explanation, the plaintiff can prevail, *inter alia*, "by showing that the employer's proffered explanation is unworthy of credence" (*id.* at 256; *Aikens*, 103 S. Ct. at 1482). Perforce, if the trier of fact disbelieves the employer's testimony, it is free to find a violation based solely on the evidence constituting the plaintiff's prima facie case. Thus, the employer's testimony merely "*allow*[s] the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus" (*Burdine*, 450 U.S. at 257; emphasis added).[14]

As we noted in the petition (at 20), it would be remarkable if judgment were *required* for plaintiff when the employer remained silent, yet were *not permitted* when the employer instead took the witness stand and gave testimony that was not believed and that the trier of fact was free to "simply disregard" (*Bose Corp.* v. *Consumers Union*, *supra*).

At all odds, this question goes to the very heart of employment discrimination litigation, and the existing conflict in the circuits demonstrate the need for its prompt resolution.[15]

III.

With respect to the second question presented, we wish to note a recently-reported decision of the Tenth Circuit holding that "statistical evidence which alone might be

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[14] Ironically, the first post-*Burdine* decision by the Fifth Circuit to address this question understood *Burdine* as we do. *Haring* v. *CPC Intern, Inc.*, 664 F.2d 1234, 1239 (5th Cir. 1981). Subsequently, in *Reeves*, *supra*, a different panel of that court, declaring that *Haring* did not hold what it appeared to hold (682 F.2d at 522-523, n.11), adopted the opposite reading followed in the decision below.

[15] On April 30, 1984, this Court dismissed as improvidently granted the writ of certiorari in *Westinghouse Electric Corp.* v. *Vaughn*, 52 L.W. 4523, referred to at Pet. 14 n.9.

insufficient to establish a prima facie case of dismrimination or to discredit an employer's proffered reason for its action" may nonetheless be considered by the fact-finder in conjunction with other evidence of discriminatory intent. *Beck* v. *Quiktrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983). (See discussion at Pet. 27-28).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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